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Hobson Manufacturing Corp. v. SE/Z Const. Clerks' Record v. 8 Dckt. 38202

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IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

HOBSON FABRICATING CORP.,
an Idaho corporation,

PLAINTIFF-COUNTER-DEFENDANT-APPELLANT,

and

SE/Z CONSTRUCTION, LLC,
an Idaho limited liability company,

DEFENDANT-COUNTER CROSS DEFENDANT-APPELLANT,

vs.

STATE OF IDAHO,
acting by and through its Department of Administration,
Division of Public Works,

DEFENDANT-COUNTER CROSS CLAIMANT-RESPONDENT.

*Appealed from the District Court of the Fourth Judicial
District of the State of Idaho, in and for ADA County*

Hon RONALD J. WILPER, District Judge

DAVID M. PENNY and
FREDERICK J. HAHN, III

Attorney for Appellant

PHILLIP S. OBERRECHT

Attorney for Respondent

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Supreme Court Civil Appeals

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1 I would have requested.
2 Q. Okay. And is it accurate to state that the
3 reply you got from Mr. Blough and Mr. Hays was that those
4 types of documents were unavailable?

5 A. I believe it might have been even a little
6 stronger than that; that the architect was reluctant to
7 give those documents to them.

8 Q. I see. Did you ever see the architect on site
9 when you were?

10 A. Never did.

11 Q. When you were there did you inform the
12 architect that you were going to be on site?

13 A. No.

14 Q. Do you know if SE/Z did?

15 A. I do not know.

16 Q. Okay. Did you request a meeting with either
17 the engineer, or the architect, or the owner, when you came
18 to the site?

19 A. No.

20 Q. Did you think it would be helpful in terms of
21 you getting an understanding of the situation and why the
22 project was in the state that it was when you first got
23 there in July of 2004, to have some sort of a meeting with
24 the owner, the architect, or the engineer, as well as SE/Z
25 and Hobson?

1 took to get to your conclusions in this matter, but I'd
2 like to ask you at this point is there a writing, some sort
3 of document where you analyzed the various impacts on the
4 job in terms of time, and made a determination as to which
5 party may or may not have been responsible for those time
6 impacts?

7 A. What's here today is every document we could
8 find.

9 Q. Okay. And we've taken a break, we've gone
10 over the materials that you brought with you, we're going
11 to go through them in a little bit more detail as the day
12 progresses; but I haven't seen notes of any type where you
13 say, this is what I know about this particular impact to
14 the schedule, or this particular issue that came up on the
15 project, and based on X, Y and Z I conclude that it was the
16 responsibility of say the owner, or the architect, or the
17 engineer, versus the general or one of its subs.

18 Is there such a document that you recall?

19 A. No.

20 Q. Is that typical in terms of how you put
21 together a delay claim?

22 A. Yes. We typically don't make the type of
23 listing that you eluded to.

24 Q. All right. And in the world of delay claims
25 analysis what do you typically do in order to conclude, one

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1 A. Not in July of 2004.

2 Q. You didn't think that that would helpful?

3 A. No.

4 Q. Why was that?

5 A. Because I was just there to prepare a
6 completion schedule.

7 Q. All right. But isn't that the time that you
8 also told SE/Z that you could do these other things, such
9 as prepare an impact schedule or a delay claim for them?

10 MR. HAHN: Object to the form.

11 THE WITNESS: I don't believe that ever came
12 up in that time frame.

13 BY MR. ANDERSON:

14 Q. When did it come up that you could prepare a
15 delay claim for them if they wanted?

16 MR. HAHN: Object to the form.

17 THE WITNESS: As I recall, that would have
18 been a discussion maybe early in 2005 when the job was
19 further delayed.

20 MR. ANDERSON: All right.

21 MR. HAHN: Good transition point?

22 MR. ANDERSON: Yeah. Let's stop.

23 (Brief recess.)

24 BY MR. ANDERSON:

25 Q. We'll work through the various steps that you

1 way or the other, which party is responsible for a
2 particular delay?

3 MR. HAHN: Can you read that back.

4 (Question read back.)

5 MR. HAHN: You can answer.

6 THE WITNESS: Our conclusions are the last
7 things we do. The first thing we do is we try to
8 reconstruct the project from a time perspective. Once we
9 feel comfortable with how the project was reconstructed,
10 then we look at the events that caused the project to be
11 extended, if in fact it is a delay item. And then we make
12 determinations of who's responsible for those events.

13 BY MR. ANDERSON:

14 Q. Okay. Generally then you reconstruct the
15 project and that would be in terms of an as-built schedule?

16 A. Yes.

17 Q. And then you look at the events on the
18 as-built schedule as your second step?

19 A. Yes.

20 Q. And as you look at them, you then make a
21 determination as to which party was responsible for a
22 particular event?

23 A. Yes.

24 Q. And event, delay, I guess, could be used
25 synonymously?

13 (Pages 46 to 49)

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1 A. Yes.
2 Q. All right. Is that generally the approach
3 that you've taken with respect to the BSL-3 project?
4 A. Yes.
5 Q. And your involvement with this project started
6 roughly in July of 2004?
7 A. Yes.
8 Q. How did you -- when was the first time you
9 heard of this project?
10 A. I can't recall the first time, but I think I
11 recall coming here in July of 2004. We would have received
12 a call from Steve Zambarano with SE/Z asking us to come up
13 and assist him on a project that was having some problems.
14 Q. All right. Had you ever worked with Mr.
15 Zambarano before?
16 A. Yes, I had.
17 Q. What projects?
18 A. The last project I worked with Steve on, that
19 I can recall, was a mapping facility at Nelles Air Force
20 Base when he worked for Intermountain Construction.
21 Q. Was there a delay of some type on that
22 project?
23 A. There was both delay and acceleration on that
24 project.
25 Q. Okay. Earlier you and I discussed the

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1 possibility that WGK had done some work prior to your
2 involvement on this particular project. Do you recall
3 that?
4 A. Yes.
5 Q. Have you seen anything, as we went through the
6 file that you brought, that would indicate that was the
7 case?
8 A. It appears that some of the scheduling
9 information from April of 2004 was prepared by WGK.
10 Q. All right. Have you seen any billings that
11 would reflect work by WGK for SE/Z prior to July of 2004?
12 A. No. Unless it's in the documents. I don't
13 recall any.
14 Q. Okay. There have been some invoices which
15 were prepared but they appear to start in July of 2004.
16 Do you have any -- let's turn to your billing
17 file and just confirm that first of all.
18 (Brief pause.)
19 BY MR. ANDERSON:
20 Q. Did you find any prior to July of 2004?
21 A. Not in this packet, no.
22 Q. Okay. Do you believe that there may be a
23 different file at WGK for scheduling work done for SE/Z on
24 this project that you didn't bring with you today?
25 A. It's possible. When we do schedules for

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1 contractors we note them as a different numbering system.
2 Q. As opposed to what?
3 A. As opposed to an hourly billing situation,
4 which we number with 500s.
5 Q. All right. So this was WGK file S521A?
6 A. Yes.
7 Q. What does all that mean?
8 A. It's the -- S would stand for SE/Z, the 500
9 would stand for a billable-by-the-hour project. The 21st
10 would be the 21st S job we have. And the A would be the
11 first job billable by the hour for SE/Z.
12 Q. So you've done 21 prior jobs for SE/Z?
13 A. For S companies. S, beginning with S.
14 Q. Okay.
15 A. But this is the first SE/Z project.
16 Q. On a billable basis?
17 A. On a billable basis. That's correct.
18 Q. Hourly basis?
19 A. Hourly basis.
20 Q. So the 21 is SE/Z? How do you --
21 A. It just happens that they're the 21st S. The
22 S before that might have been Safeway, you know, would have
23 been 520, as an example.
24 Q. Okay.
25 A. And then we keep track. The A to Z is how

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1 many times we worked for them. And if we work for them
2 beyond the Z we then switch to 200 numbers and continue
3 with another A to Z. We have some clients we've done that
4 for, we work for multiple jobs.
5 Q. Sounds clear.
6 All right. So when you were preparing to go
7 to the job site in July of 2004, I believe you undertook a
8 couple of activities to acquaint yourself with the project
9 in general; is that accurate?
10 A. Yes.
11 Q. Can we go through the materials that you have
12 and identify either earlier schedules that you prepared, or
13 -- I'm sorry, printed off, or other materials that you
14 pulled up just to familiarize yourself with the project?
15 A. Yes, we can.
16 Q. Okay.
17 MR. ANDERSON: Off the record.
18 (Discussion off the record.)
19 BY MR. ANDERSON:
20 Q. All right. I think let's pull his personal
21 file as well. The one's in the manila folder.
22 All right. What do you have?
23 A. This is my personal folder on this project.
24 Q. Okay. And from it can you assist us by
25 indicating what you either printed off or prepared in

14 (Pages 50 to 53)

1 anticipation of going to the job site for the first time?
 2 (Exhibit No. 449 marked.)
 3 BY MR. ANDERSON:
 4 Q. All right. What have you pulled from your
 5 personal file?
 6 A. This, I believe, would have been prepared as I
 7 went -- as I came to Boise. This appears to be a schedule
 8 update dated 30 April '04, which I would have printed in
 9 July prior to my visit to the bio lab.
 10 Q. Okay. And what was the purpose of doing that?
 11 A. The purpose is, since I knew absolutely
 12 nothing about the project, I wanted to see what type of
 13 activities were involved in the project. Just get a handle
 14 on how things looked scheduling wise.
 15 Q. All right.
 16 A. And this also appears to be another schedule
 17 that I would have computed. And this had a data date of 25
 18 November '03.
 19 Q. All right. And it has a plot date of July 19,
 20 2004?
 21 A. Correct.
 22 Q. Which would have been either shortly before or
 23 on the day you came out?
 24 A. Pretty close to when I came here.
 25 Q. And why did you run this particular chart?

1 A. I would have ran any scheduling information I
 2 had, and obviously I had those two files.
 3 Q. So this one would show completion as of
 4 November of 2003, and the first one you indicated would
 5 have been sometime in April of 2004?
 6 A. Correct. It would show the status of
 7 activities.
 8 Q. All right.
 9 MR. ANDERSON: Why don't we mark the first one
 10 that you mentioned, the one showing an April 30, 2004, data
 11 date as the next exhibit.
 12 Now, are we going to be able to just mark
 13 these and then get copies of them later?
 14 MR. HAHN: Do you want to keep these in your
 15 file and make copies? What do you want to do?
 16 Let's go off the record real quick.
 17 (Discussion off the record.)
 18 (Exhibit Nos. 450 & 451 marked.)
 19 THE WITNESS: This one is just one copy, it's
 20 two sheets.
 21 BY MR. ANDERSON:
 22 Q. Okay. All right. So the other schedule that
 23 you would have run we'll mark as Exhibit 451, and it would
 24 have shown the progress of the job up through November 25
 25 2003, at least by virtue of this document?

1 A. Correct.
 2 Q. And these are just background sources of
 3 information for you?
 4 A. Correct.
 5 Q. All right.
 6 MR. HAHN: And for the record, you must not
 7 have an electronic copy of this or you would have it
 8 because I think we -- he's transmitted all electronic
 9 copies to me, and they've been provided to you on disk. So
 10 we'll have to hard copy 451.
 11 MR. ANDERSON: I haven't -- I don't know what
 12 I've copied off that disk.
 13 MR. HAHN: So you might want to check that.
 14 MR. ANDERSON: Okay.
 15 THE WITNESS: Do you want me to explain this?
 16 BY MR. ANDERSON:
 17 Q. Sure. Go ahead and explain.
 18 A. Well --
 19 Q. Years of experience led to that question.
 20 A. Let me tell you some significance about these
 21 type of graphics, this plot.
 22 Q. Okay.
 23 A. I can tell because we have some additional
 24 printing on this graphic that's not typically printed on a
 25 Primavera graphic, that being the data date.

1 Q. Okay.
 2 A. Okay.
 3 Q. And there's also other green --
 4 A. Other dates, okay. This shows me this was
 5 done in the DOS version as opposed to the Windows version,
 6 okay. First thing.
 7 Q. How does it show you that?
 8 A. I just know because you can't do this on the
 9 Windows version. You can't do some of these things on
 10 Windows --
 11 Q. Okay.
 12 A. -- that you can in DOS. So it's on the DOS
 13 program, which nobody has access to, you can't buy it
 14 anymore. We have a copy at our office but there can't be
 15 ten companies that have a copy of the DOS. That's the
 16 first thing. So you couldn't run this thing on any kind of
 17 program.
 18 Second of all, when this -- when this data is
 19 added to the graphic it's not part of the file. It comes
 20 out as -- it creates an additional file in the system that
 21 is not usually saved unless you specifically save it. It's
 22 a one-time deal. When you hit print, you're done with it.
 23 So we would have obviously printed two of
 24 those and printed only one of these. And we might not have
 25 this. I can probably reconstruct this, but we possibly

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1 might not have this exact file anywhere in any of our
2 computers.
3 Q. And you're referring to Exhibit 451?
4 A. 451 and also --
5 Q. 450?
6 A. 450.
7 Q. Okay. And you may have the schedule itself
8 but not the annotation or the annotated version.
9 A. Correct. And we wouldn't have the exact
10 appearance anymore of what this looks like.
11 Q. Okay. Well, we have these and we can make
12 copies of them if we need to.
13 What else did you do, if you can recall,
14 before you went to the job site for the first time?
15 A. I can't be certain, but it appears that I ran
16 hard copies of all the scheduling files that we had
17 pertaining to this project.
18 Q. Okay.
19 A. And brought them probably to Boise with me.
20 Q. Those would be in your personal file?
21 A. They're in my personal file. There happens to
22 be two copies of each one with -- and they're both --
23 appear to be identical in format.
24 No, one is different in format. One is
25 identical. But what I believe they refer to is the two

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1 graphics, which is 450 and 451. This is the hard copy data
2 for those graphics.
3 MR. ANDERSON: Why don't we mark those as the
4 next exhibit. And if you want to have them back we'll put
5 a Post-it on them and make copies.
6 MR. HAHN: Why don't we just make copies and
7 then mark the copies?
8 MR. ANDERSON: Probably could take more time
9 if we get up and go back and forth.
10 MR. HAHN: Okay. Mike can do that if we want
11 to, that's fine.
12 THE WITNESS: Just to be clear. Two of these
13 represent one file, and the other two represent the later
14 file that we saw. But they are different organizations of
15 the data
16 BY MR. ANDERSON:
17 Q. All right.
18 A. So they're different reports.
19 Q. If you could, tell us which ones relate to
20 Exhibit 450, the April 30, 2004, data date.
21 A. We have a note on here that these are called
22 our file SA10. And we have two reports, both consultant's
23 reports, both have detail of activities in them.
24 One is organized by strictly ID number, and
25 one is organized by early start. That's the difference in

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1 the two reports.
2 Q. And they go with Exhibit 450?
3 A. With Exhibit 450, correct.
4 MR. ANDERSON: All right. Why don't we mark
5 those as Exhibit 452.
6 (Exhibit No. 452 marked.)
7 BY MR. ANDERSON:
8 Q. And the other?
9 A. The other one we have noted as SA01. And
10 they, again, are two different hard copies of the computer
11 information for graphic two, 451, both consultant reports,
12 again both with detail for activities. One by -- one
13 sorted by ID number, one sorted by early start.
14 And another thing this tells me, since we --
15 since these are SA00 -- SA10 and SA01, these would have
16 been probably the only two files we had that we could run
17 graphics from.
18 Q. How did those designations tell you that?
19 A. Well, the designations -- I'm not sure exactly
20 how this might have been coded, but SA01 would tell me that
21 this was the first update for the construction schedule.
22 Q. And how does it tell you that?
23 A. By the 01 designation.
24 Q. And what does the SA stand for?
25 A. SA stands for the S as our job number. And

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1 the A is the first job within that group. So SA is that
2 job; 01 is the first update.
3 This one, the one that is marked 452, is SA10.
4 But nowhere did I find an SA2 to SA9. We would have jumped
5 to SA10 being probably the tenth month of the project, if I
6 had to guess without counting months, is my guess.
7 MR. ANDERSON: All right. So we'll mark the
8 SA01 documents as 453.
9 (Exhibit No. 453 marked.)
10 BY MR. ANDERSON:
11 Q. All right. If you turn to Exhibit 449 -- and
12 before we do, are there any other documents that you've
13 seen or can recall preparing prior to coming out?
14 A. That's what I'm looking for.
15 Q. Keep looking then. Thanks very much.
16 (Brief pause.)
17 MR. HAHN: Off the record.
18 (Discussion off the record.)
19 BY MR. ANDERSON:
20 Q. What else have you found?
21 A. I've looked in my folder further and find that
22 I need to correct myself on information -- some statements
23 I made on 453, 452, 450, and 451 saying those were probably
24 the only files. There appears there were additional files.
25 Q. Because you had the calculation?

16 (Pages 58 to 61)

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1 A. I had the calculation sheets on some
2 additional files. And as I look at these calculation
3 sheets I do not believe that these files originated with
4 us.
5 Q. Okay. And what leads you to that conclusion?
6 A. Just how some of the -- what some of the
7 calculation sheets tell me. We don't number -- they're not
8 numbered the way we number our jobs. We don't use this
9 kind of numbering system. So I do not believe --
10 Q. Which numbering? You just pointed.
11 A. We don't use the activity ID identifier they
12 use. We don't typically do that. We try to logically put
13 ours together where for, say, 1000 activities might be all
14 foundation work, 2000 might be structure through enclosure,
15 3000 might be finishes -- and 4000 could be finishes on the
16 first floor and 4000 be finishes on the second floor.
17 We try to keep -- group our numbers together.
18 This one is not numbered like that.
19 Q. All right. Now if you, being WGK, were
20 assisting a company develop schedules as the project went
21 along, would it be unusual to follow the original numbering
22 system from the client throughout?
23 A. The answer is yes and no.
24 Q. Okay. Go ahead and explain.
25 A. If were unsatisfied or unhappy with the

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1 numbering system that one of our clients uses, we will try
2 our best to put our own numbering system in there.
3 Q. Okay.
4 A. Sometimes the owner of the project will not
5 allow that. So in those cases we maintain the numbers that
6 are initial. Otherwise we note in the log the original
7 number always, because we always want to have a way to go
8 back to the original number.
9 Q. Okay. So you've found some other materials --
10 A. Yes.
11 Q. -- you think might have been prepared prior to
12 going to the project the first time?
13 A. I believe so. These appear to be printed
14 July 19th also. Same time as the plots.
15 MR. ANDERSON: Let's just mark those as the
16 next Exhibit, 454.
17 (Exhibit No. 454 marked.)
18 THE WITNESS: And they're a variety of --
19 looks like updates -- and I'll just name them off. We have
20 SA01, which is one that we printed. We have SA02, SA03,
21 SA04, SA05, SA06, SA07, SA08, SA09, and SA10, which is the
22 last one we prepared.
23 BY MR. ANDERSON:
24 Q. Why did you run those and what did they tell
25 you?

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1 A. Well, I would have -- this is something we
2 always do when we get someone else's schedule, or even one
3 of our own. We run the calculation sheet. The calculation
4 sheet tells you a lot about the working of the schedule.
5 Q. Okay. What do you believe you had in order to
6 run the materials marked as Exhibit 454, 453, and 452?
7 A. I could only run those if I had the electronic
8 files for those schedules.
9 Q. And you would have had to obtain those from
10 SE/Z?
11 A. Would have had to obtain those from SE/Z.
12 Q. All right.
13 MR. ANDERSON: Have we seen those, Counsel?
14 MR. HAHN: As we've discussed before, SE/Z did
15 have a computer that crashed during the pendency of this
16 project. The only electronic schedules that we've produced
17 are those that we have been able to get from WGK.
18 MR. ANDERSON: That was my understanding.
19 MR. HAHN: I don't know that you have seen the
20 electronic files represented in Exhibit 454. I don't
21 believe they exist any longer.
22 MR. ANDERSON: Okay.
23 BY MR. ANDERSON:
24 Q. All right. After preparing these materials
25 you decided to go to the job site to do what?

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1 A. Well, let me clarify your question, if I
2 might. I would not have prepared these and then decided to
3 go. I would have been asked to go and I would have
4 prepared these to help assist me when I got here.
5 Q. Fair enough. And if we turn to Exhibit 449 --
6 and I don't have the individual pages numbered but if you
7 can go to the section that would have -- you've got it
8 right there -- contained your billings.
9 Is the first one that you find dated July 31,
10 2004, in terms of an invoice date?
11 A. That's the earliest one that I've seen, yes.
12 Q. And for the record, what we have marked as
13 Exhibit 449 is the explanation for SE/Z's damages provided
14 to us in the mediation statement of SE/Z.
15 I understand that there's a later iteration of
16 this cover sheet that we'll get to at some point in time,
17 but for the purpose of this particular question do you
18 recognize Exhibit 449 as constituting the backup and
19 recapitulation of SE/Z's damages as of May 2007?
20 MR. HAHN: I'm going to object to the form.
21 THE WITNESS: I was never involved in the
22 mediation.
23 BY MR. ANDERSON:
24 Q. Okay.
25 A. So I don't believe I've ever seen this before.

17 (Pages 62 to 65)

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1 Q. Okay. You didn't have anything to do with
2 this cover sheet?
3 MR. HAHN: Object to the form.
4 THE WITNESS: No, I did not.
5 BY MR. ANDERSON:
6 Q. What about the second page that deals with
7 home office overhead; is that anything you would have had a
8 hand in?
9 MR. HAHN: Object to the form.
10 THE WITNESS: Not at this time.
11 MR. ANDERSON: Let me ask the basis of the
12 objection maybe I can clear it up.
13 MR. HAHN: I think if you pulled the request
14 for Equitable adjustment it's obvious that at least one
15 iteration of the first page of Exhibit 449 came from Mr.
16 Kopmeyer's office. If your question is whether he had any
17 involvement or reviewed the specific page 449, I think your
18 question is unclear. And the same is true of the second
19 page.
20 Let's take a quick break.
21 (Brief recess.)
22 BY MR. ANDERSON:
23 Q. The first page of Exhibit 449 is in a format
24 that you've not been involved with; is that correct?
25 A. I was not involved in the mediation at all.

1 A. Perhaps I only made one trip or we're missing
2 an invoice someplace would be my only thinking.
3 Q. They did skip between 11 -- I'm sorry
4 10/31/2004 and 3/31/2005. So, do you know if there's any
5 intervening invoices for this project in that time period?
6 A. I would not know.
7 Q. But if SE/Z has represented that if you add up
8 all your invoices, it comes to the amount that they're
9 seeking, it looks like they're pretty convinced that there
10 aren't any missing invoices; correct?
11 A. I would believe so. I believe they would have
12 included every one of my invoices.
13 Q. In fact, I think you had a list of invoices
14 somewhere in your materials that we'll find at some point
15 where you've added up the invoices; do you recall that?
16 A. Yes.
17 Q. Okay. See if we can locate that.
18 So you came to the project in July of 2004.
19 MR. ANDERSON: Let's mark this as the next
20 exhibit.
21 (Exhibit No. 455 marked.)
22 BY MR. ANDERSON:
23 Q. What I've marked as Exhibit 455 is a daily log
24 prepared by, I believe, Mr. Blough of SE/Z. Do you
25 recognize that format; or have you ever seen a document

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1 Q. And set that aside. I understand that. But
2 you didn't help prepare the first page of Exhibit 449; is
3 that correct?
4 A. No.
5 Q. All right. Now, in the middle of that stack
6 of documents marked as Exhibit 449 there are some invoices.
7 The first of which appears to be dated July 31, 2004. Do
8 you see that?
9 A. Yes.
10 Q. And it shows some travel expense on there.
11 A. Correct.
12 Q. And do you believe that that represents the
13 trip that you made to the site?
14 A. I believe so.
15 Q. Would you look at the other invoices that have
16 been produced and tell me if you see any other travel
17 expense.
18 (Brief pause.)
19 THE WITNESS: I don't see any other travel
20 expense on any of these invoices, no.
21 BY MR. ANDERSON:
22 Q. You indicated earlier that you thought you'd
23 made a second trip. Does this help refresh your memory
24 that perhaps you only made one trip to Boise for this
25 project?

1 that looks like this?
2 A. I have seen similar documents to this, yes.
3 Q. Okay. Now there were some -- I think you
4 called them daily logs -- in the materials that you
5 provided; is that correct?
6 A. Correct.
7 Q. Let's turn to those real quickly.
8 We had two groupings of them -- off the
9 record.
10 (Discussion off the record.)
11 BY MR. ANDERSON:
12 Q. I'm going to hand you a stack of documents
13 that we have located in your files. Can you tell me what
14 those materials consist of?
15 A. Appears to be daily reports.
16 Q. And do you know the difference between those
17 daily reports and the ones we have marked as Exhibit 455?
18 A. I don't recall what the difference would be in
19 these two but there is a difference in the two reports.
20 Q. Okay. Were you ever provided the type of
21 daily reports represented by Exhibit 455?
22 MR. HAHN: Do you want him to look at the
23 entire stack?
24 MR. ANDERSON: Sure.
25 (Brief pause.)

18 (Pages 66 to 69)

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1 BY MR. ANDERSON:

2 Q. What's the date of Exhibit 455?

3 A. 7/21/04.

4 Q. Okay. For the record, can you tell us from
5 that stack that you have in terms of the daily report
6 format that you were provided, what date range is included?

7 A. It appears to be --

8 Q. Is your bottom one kind of hard to read?

9 A. My bottom one is hard to read. But it looks
10 like January 1, 2005, to May 13, 2005.

11 Q. All right. And the second stack appears to
12 track, so we won't copy those for the time being. But
13 let's leave them right here so we can use them if we need
14 to.

15 A couple of obvious questions. Did you ever
16 request daily reports for 2004?

17 A. I would have asked for all the daily reports,
18 yes.

19 Q. Okay. Did you ever receive daily reports for
20 2004?

21 A. I believe I would have received them all. At
22 one time SE/Z requested many of their documents to be
23 returned. We had mostly originals so I recall sending them
24 back the documents.

25 Q. Okay. Well, one of the stacks of daily

1 reflected in the materials that you produced to us today?

2 A. Well, it would be reflected as as-built data
3 in the materials.

4 Q. And the as-built data would be portrayed or
5 depicted on what document or documents?

6 A. On the graphics that are here.

7 Q. Let's hold that to the side for just a minute.

8 You went to the job site on, it appears, July
9 21, 2004. Do you see that on Exhibit 455 on the second
10 page it has your name?

11 A. Yes, I do see that.

12 Q. It talks about you meeting with Barry Hayes
13 and Mr. Blough to review job status and the schedule.

14 A. Correct.

15 Q. And then it says SE/Z will meet with all subs
16 on Thursday -- that would have been the following day -- to
17 review the lab, gather information, and produce a revised
18 schedule.

19 As you sit here today does this refresh your
20 memory in terms of whether or not you actually spent two
21 days at the job doing this initial visit, or perhaps just
22 one?

23 A. No, I spent two. I was at this meeting with
24 all the subs.

25 Q. Where did it take place?

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1 reports was faxed to you.

2 A. Yes.

3 Q. And if you didn't have 2004, you could have
4 had it faxed as well; correct?

5 A. I didn't understand your question.

6 Q. You don't have any copies of 2004 documents in
7 your records.

8 A. I have all the records I had in my file here.

9 Q. And you would have had -- you still have all
10 transmittal letters?

11 A. I believe everything is here from our office,
12 yes.

13 Q. Okay. All right. When you say you think you
14 had 2004 daily reports, what leads you to that conclusion
15 or belief?

16 A. I just -- I can just recall receiving all of
17 the daily reports for the project.

18 Q. Okay. What would you have done with them upon
19 receipt?

20 A. I would have used them somehow in the
21 scheduling at one time or another.

22 Q. How?

23 A. To verify the start dates, finish dates,
24 suspension times, disruptions, things of that nature.

25 Q. Okay. What would that be -- how would that be

1 A. The actual meeting with the subs was at
2 Hobson's offices.

3 Q. Okay. Do you recall how long you were at the
4 job site on the first day, July 21, 2004?

5 A. I do not recall.

6 Q. The invoice that we saw in Exhibit 448 has a
7 gross number of hours for the principal, and some for
8 consultants, but no breakdown. Do you know if there is a
9 breakdown for the hours that you billed SE/Z in July of
10 2004?

11 A. Only if it's in the documents that I brought.

12 Q. Is there an electronic file somewhere in terms
13 of your billings to SE/Z?

14 A. I do not believe so.

15 Q. Why not?

16 A. Our company, we changed our accounting system
17 and we went from a very old accounting system to we now
18 have Quick Books. And all of that -- we didn't save any of
19 the old stuff. Our new stuff is all started, I believe,
20 sometime in 2006 in Quick Books.

21 Q. Turn to the last invoice dated 1/31/2007.
22 They're in Exhibit 449.

23 There's a sheet that seems to accompany it
24 with a breakout for hours -- I'm sorry, a breakout of hours
25 for individuals working on this project. Do you see that?

19 (Pages 70 to 73)

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1 A. Yes.
 2 Q. Would that be the type of data your new
 3 accounting system can provide?
 4 A. This looks like our new accounting system,
 5 yeah, because see it's in -- it's in -- the way it's shown
 6 it's different than what our old one showed. It shows the
 7 durations.
 8 Q. Did you check to see if there was any
 9 electronic file still maintained by WGK for the SE/Z work
 10 that was performed?
 11 A. I believe I would have asked for that from our
 12 accounting people. But we have new accounting people
 13 since.
 14 Q. Could you ask again to make sure that there --
 15 that you've covered that base?
 16 A. Yes, I can go back and ask.
 17 Q. All right. Thank you.
 18 Do you have any notes from your visit to the
 19 lab in July of 2004?
 20 A. Yes, I do.
 21 Q. Let's see what you have.
 22 MR. HAHN: Are we off the record?
 23 MR. ANDERSON: Sure.
 24 (Brief recess.)
 25 (Exhibit No. 456 marked.)

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1 BY MR. ANDERSON:
 2 Q. All right. Exhibit 456 appears to be some
 3 notes dated both July 21st and July 22, 2004. Would these
 4 be the notes you prepared during your first visit to Boise
 5 on this project?
 6 A. Yes.
 7 Q. And could you just going through those and
 8 tell us what you were doing, please.
 9 A. Well, the first page I recall walking the
 10 whole project, which was surprisingly small to me. I was
 11 expecting more, a bigger project. It wasn't very much
 12 area. It was small.
 13 Q. Why was that surprising?
 14 A. It just surprised me that such a small project
 15 would have so many problems. It was just small.
 16 Q. Okay.
 17 A. But what I'm doing here is I'm trying to
 18 determine what's the best way to do a completion schedule,
 19 how to break it down by areas. So as I walked the
 20 different areas I was noting what the areas were called.
 21 So I was going to break the schedule up into these
 22 different areas.
 23 Q. Okay.
 24 A. And we discussed each area, the problems, and
 25 things like that.

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1 The second page would have been more of a
 2 detailed walk-through again. And Hobson was at this one.
 3 I don't believe Hobson was with me the first day. I think
 4 Barry Hayes and Curt. And we went through and talked about
 5 all the remaining work in each area, as you can see on the
 6 basement here.
 7 Q. Tell me how you know -- you say Hobson was
 8 there?
 9 A. Yeah, because I've got him noted here, Hobson.
 10 Q. Don't you say at Hobson Fabrication?
 11 A. Yeah. But Hobson would have been with us on
 12 site too. We walked the site with Hobson. I recall
 13 walking it with Hobson and the other subs also. And we
 14 might have done it either prior to the meeting, or after
 15 the meeting; but I recall doing that.
 16 Q. It doesn't appear --
 17 A. Because I wanted to visualize what work had to
 18 be done.
 19 Q. Okay. It doesn't appear you took any notes in
 20 which you refer to that particular walk-through; is that
 21 correct?
 22 A. Well, I think it's in conjunction with
 23 starting with page 2.
 24 Q. Okay. So what do you have there in the first
 25 part? You've got the job number, you've got the date,

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1 you've got Barry Hayes, Curt Blough at Hobson Fabrication.
 2 A. Right.
 3 Q. You do remember a meeting at Hobson
 4 Fabrication?
 5 A. I do remember a meeting at Hobson. We talked,
 6 you know, Hobson was there and all the remaining
 7 subcontractors were there.
 8 Q. Okay.
 9 A. I do not recall the names of the
 10 subcontractors. You know, to me it was insignificant. I
 11 just wanted to know who was doing what work. You know, we
 12 have an electrician here, we've got a mechanical guy here.
 13 Q. Now was it during these meetings that you were
 14 told that it was not possible for you to view minute
 15 meetings prepared by the architect or any field observation
 16 reports by the mechanical engineer, or any other materials
 17 from the owner that might also come to bear on some of the
 18 issues that you were being told about?
 19 A. Not at this meeting. I wouldn't have asked
 20 for those.
 21 Q. Okay. It would have come later?
 22 A. Later, yes.
 23 Q. All right. So what happened on the 22nd?
 24 A. Well, I'm looking here at the basement, I'm
 25 looking at work that has to be done. The second part of

20 (Pages 74 to 77)

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1 that sheet, this is sheet 2, these were obviously questions
2 I was asking of Lea Electric. These all relate to
3 electrical questions.

4 Q. Okay.

5 A. And there -- these are out of order. My next
6 sheet is sheet 4. And again, there's -- sheet 4 relates to
7 the reception entry area.

8 Q. Hold on. Why don't we just fix them because
9 we're allowed to. There should be a stapler, hopefully, in
10 that drawer.

11 MR. ANDERSON: We can go off the record.

12 (Discussion off the record)

13 BY MR. ANDERSON:

14 Q. Page 3.

15 A. Page 3 is just my notes on what was left in
16 the bio lab which, is the main part of the project. What
17 work was left in the bio lab.

18 Q. Okay.

19 A. And it looks like during my -- either my
20 walk-through or discussion I'm trying to connect how the
21 flow of the activities works.

22 Q. Give me an example, if you could.

23 A. Well --

24 Q. I take it that WD would be work days?

25 A. Yes.

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Page 81

1 Q. Now, how did you understand this project was
2 to be analyzed in terms of days of work? Was it a calendar
3 day or a work day analysis?

4 A. I don't really recall but it's a state job,
5 it's probably a calendar day project. Very few things are
6 built in work days anymore, that's kind of the whole thing.

7 Q. Why do you have WD then?

8 A. Because we always schedule things in terms of
9 work days. We can convert it to calendar days very easily;
10 it 5/7, it's very easy in the computer to do that. Take
11 the holidays out, put them in. It's very easy for us. We
12 just always think in terms of actual time it takes to do it
13 when you're on the site with labor.

14 Q. Okay.

15 A. That's why we use work days. But one of the
16 logics that I can see in this is I've got this note here in
17 the center that says ceiling framing. And I've got an
18 arrow pointing over to lighting. Then I've got mechanical
19 drops. So it looks like lighting, mechanical drops follows
20 lighting, lighting follows ceiling framing. I've got two
21 arrows pointing between lighting and mechanic drops it
22 means it's probably a start to start lag. One doesn't have
23 to finish to start the other one. And then I have all the
24 work going back to when we drywall the ceilings. I
25 remember this was a hard ceiling on this thing. That's

1 just one of the examples.

2 Page 4 is the reception entry area. It's kind
3 of a -- I remember it being a small area. I remember it
4 being SE/Z had their kind of office in there. They had a
5 computer in there.

6 Q. Okay.

7 A. Page 5 is the corridor outside the bio lab and
8 I believe, if I recall, that's where the mechanical
9 electrical system tied in from the existing to this new --
10 to the new. Work that had to be done there.

11 Q. On that page it has welding fix at stainless
12 steel duct. And you've got something in a circle. What is
13 that?

14 A. Well, what I recall -- and I looked back at
15 one of my printouts here, it shows a similar type thing.
16 During the walk-through and during the discussion we, you
17 know, there was -- this revolves around this PR, proposal
18 request 21. And I believe that's fixing the welding.

19 There was -- welding was obviously a major
20 issue here. And the August 2nd is when -- at the time I
21 was there in July, everyone thought they'd be done with
22 that. That issue would be dead on August 2nd. It didn't
23 happen, but that's when everyone thought it would happen.
24 They thought we've got this much days of work left, we
25 should be out of here August 2nd. So I needed a time frame

1 so I could finish the rest of the work. That was holding
2 up everything inside the bio lab.

3 Q. Okay.

4 A. Okay. And there's some of this in this
5 corridor, there's some welding in the corridor.

6 I have page 6 is the penthouse.

7 Q. What did you -- what were you told about PR 21
8 in July of 2004?

9 A. Not too much. It was just -- I would have
10 just been told there was a PR that was holding up the job
11 at that time. It was affecting repairing welds.

12 You know, I looked at some of the welds and
13 they looked okay to me. I saw where they were polishing
14 off the welds and making it, like, really smooth and I kind
15 of questioned why they really had to do all that on the
16 outside, but that's what they were doing. That's what they
17 were told to do.

18 Q. Did you look on the inside?

19 A. I didn't crawl inside the ducts, no.

20 Q. Did you inquire if there were any problems on
21 the inside of the duct?

22 A. No. All I -- at this time I was just
23 interested in how long is it going to take you to finish
24 this so we can get on.

25 Q. Do you know what oxidation is in terms of

21 (Pages 78 to 81)

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1 welding?
 2 A. Yes, I know what oxidation is.
 3 Q. What is it?
 4 A. Well, oxidation is --
 5 MR. HAHN: You just want his understanding?
 6 THE WITNESS: Just my understanding of
 7 oxidation.
 8 BY MR. ANDERSON:
 9 Q. If you're going to tell me somebody else's
 10 understanding that wouldn't be right.
 11 A. Well, oxidation is just, you know, these were
 12 stainless steel ducts and I'm sure the welding had to be a
 13 certain way to maintain the metal-to-metal type of stuff.
 14 And oxidation can cause the metal to deteriorate and fail.
 15 Q. Okay. That wouldn't be a good thing?
 16 A. It's a good thing in structural steel in some
 17 buildings because oxidation seals in the structural steel.
 18 Some buildings are made to oxidize.
 19 Q. Okay. And are you saying it's a good thing
 20 with stainless steel?
 21 A. I'm not saying that. I'm saying oxidation is
 22 not always bad.
 23 Q. Are you saying it's a good thing for a BSL-3
 24 laboratory?
 25 MR. HAHN: Object to the form.

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1 THE WITNESS: I'm not saying that. You just
 2 asked me if oxidation is a good thing or bad thing. And in
 3 general it can be both.
 4 BY MR. ANDERSON:
 5 Q. A moment ago you said, well, these welds
 6 didn't look too bad to me, and I'm just trying to explore
 7 with you what you know about welding stainless steel for a
 8 facility of this type.
 9 A. Well, just visually the welds on the outside,
 10 they looked fine to me. That's just my -- I remember that,
 11 seeing that as I walked through thinking, why do they have
 12 to grind off all these welds and make them smooth. I
 13 didn't understand that.
 14 Q. So that was kind of your thought process as
 15 you were starting your work on this project?
 16 A. Wasn't my thought process; it's just a
 17 recollection I have.
 18 Q. Okay. And did that -- I guess, do you think
 19 that that influenced your analysis of any of the issues on
 20 this project?
 21 A. No.
 22 Q. Okay. You could set that aside in terms of
 23 how you analyzed whether or not welding issues might be the
 24 responsibility of the owner or the contractor?
 25 A. Sure. What I saw on the site that day had no

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1 influence on time frames it took to do those components
 2 and who might be ultimately responsible for it.
 3 Q. Okay. Because you would have had to do more
 4 in order to analyze who was responsible; correct?
 5 You couldn't just look at it and say, well,
 6 jeez this would be the fault of somebody, one of the
 7 parties on the job?
 8 MR. HAHN: Object to the form.
 9 THE WITNESS: Not on those welds, no.
 10 BY MR. ANDERSON:
 11 Q. Okay. And the welds, obviously, were one of
 12 the issues that had held up the project.
 13 A. At the time I was called out there it was
 14 holding up the project; that's correct.
 15 Q. So you knew that that would be one of the
 16 areas that you would have to be looking at if you were ever
 17 going to do a delay analysis on this project?
 18 A. Delay analysis never came into my mind when I
 19 went out there in July. My whole job was to finish the job
 20 schedule wise. That's all I was there for.
 21 Q. Okay. There's another circle in the lower
 22 right-hand side of page 5 of Exhibit 456. And it says work
 23 through CO, or change order number 9. Do you recall what
 24 that was about?
 25 A. I don't recall. I'm just assuming that maybe

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1 that's the only approved one through the date I was there
 2 or something. I don't really recall what that note means.
 3 Q. And then you have August 2nd comes for review,
 4 and then it's kind of scribbled out. Do you know what that
 5 means?
 6 A. Somebody must have mentioned to me that they
 7 were going to be done on August 2 with the ducts. And so
 8 had to put that time frame in so I could try to finish the
 9 schedule in the project.
 10 Q. Do you recall that there was actually an
 11 inspection on August 3rd and 4th of the welds?
 12 A. I don't recall.
 13 Q. Okay. Page 6, what was going on there?
 14 A. This is the penthouse.
 15 Q. Okay. The first one says five work days,
 16 dash, delay stainless duct. What did that refer to?
 17 A. Well, that would be the amount of time it was
 18 going to this August 2nd date before things could continue
 19 in the penthouse because there was some of that duct, I
 20 believe, coming up in the penthouse. That's all that
 21 means. You know, I'm just trying to get the road map I
 22 need to build the schedule.
 23 Q. Okay. Let's go to page 7.
 24 A. Page 7, make-up air units on the platform.
 25 Q. Again, this would be work still left to

22 (Pages 82 to 85)

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1 complete?
2 A. Still left to complete.
3 Q. All right.
4 A. I wasn't viewing the future for any problems.
5 This is what actually needed to be done.
6 Q. All right. Page 8, same thing?
7 A. Page 8 site work, different miscellaneous
8 things. Yeah, there's handrails and doors and things.
9 Q. Okay. The last page.
10 A. Okay. The last page it looks like I drafted
11 up very quickly just a series of events to finish the main
12 bio lab area.

13 Q. Okay.
14 A. Just these are the type of work that has to be
15 done. And looks like I needed to get this to SE/Z in a few
16 days. So they were kind of pressing me to get it done.
17 That's what that all shows me.
18 Q. All right. So once you took those notes do
19 you recall doing anything else in terms of creating or
20 reviewing documents in Boise on that initial visit?
21 A. I recall looking at some of the files that
22 Curt had here. Just looking at files he had in his -- he
23 had that little-bity office in the entry way. He had a
24 computer set up there and he had a little file cabinet.
25 And I said well, let's see what you've got. And I just

1 A. Based on my site visit, and the amount of work
2 that had to be done, I came up with 27 November '04.
3 Q. All right. Now, once you got that -- when did
4 you run that completion schedule?
5 A. Well, it was plotted on 28 July '04, and I
6 notice my note that we just looked at, Barry wanted it by
7 27 July, so I was one day late. I got it to him as quick
8 as I could.
9 Q. All right.
10 MR. ANDERSON: Let's mark this as the next
11 exhibit, please.

12 (Exhibit No. 457 marked.)
13 MR. ANDERSON: Let me see that. Off the
14 record.

15 (Discussion off the record.)
16 (Document marked as Exhibit No. 457
17 withdrawn.)

18 BY MR. ANDERSON:

19 Q. Mr. Kopmeyer, Exhibit 406 to the deposition,
20 to the series of depositions that we've taken, is a July
21 12, 2004, e-mail from Mr. Zambarano to, I guess, one of
22 your partners Phil Gudgel; is that correct?

23 A. That's correct.

24 Q. And Mr. Zambarano says to Phil, as we
25 discussed last Friday, let me know when you can get with us

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1 kind of read through them real quick. And that's about it.
2 I didn't go into any detail on anything he had.
3 Q. So SE/Z didn't have a trailer on site for his
4 office?
5 A. No. I believe he was working right out of
6 that one space.
7 Q. Okay. In your discussions with Mr. Blough did
8 you get the impression that he was objective in terms of
9 the information he was providing you?
10 A. I didn't get an opinion one way or the other.
11 When I asked for information, and I asked it through Barry
12 Hayes, Curt would respond with the answers I needed.
13 Q. Okay. All right. Anything else that you've
14 seen in your file today, or that you recall being prepared,
15 as a result of that initial visit to Boise in July of 2004?
16 A. Not that I recall, or nothing else in my file.
17 Q. Okay. What did you prepare as a result of
18 that visit, if anything?
19 A. I prepared a completion schedule.
20 Q. All right. I think we've outlined one of
21 those here.
22 A. It's one of these.
23 Q. And if you could, just tell us what completion
24 date you came up with based upon the input you used based
25 on your site visit.

1 to work on developing a new construction completion
2 schedule -- that's what you've been telling us about;
3 correct?
4 A. Correct.
5 Q. Then it says, and to develop an impact
6 schedule. What is an impact schedule?
7 A. An impact schedule would be to insert delaying
8 events into the schedule.
9 Q. Okay. Did Mr. Gudgel share with you, before
10 you went to the job site, that Mr. Zambarano was interested
11 in an impact schedule as well as a completion schedule?
12 A. I don't recall that. And I don't recall -- I
13 don't believe he did.
14 Q. Okay. Let me hand you Exhibit 457.
15 (Exhibit No. 457 marked.)
16 BY MR. ANDERSON:
17 Q. All right. Exhibit 457 is a document produced
18 out of the SE/Z file. Can you just identify what that is,
19 sir?
20 A. Well, it appears to be an update report.
21 Q. Did you utilize that in any way in preparing
22 your completion schedule?
23 A. No. My completion schedule would have already
24 been done before this came out.
25 Q. Well, it looks like a data date of July 26,

23 (Pages 86 to 89)

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1 2004. And I thought you said July 28th?

2 A. Yeah. But this is run in August of '04. So
3 this was run after -- it probably came off that same file
4 but it's run after the fact.

5 Q. They just picked July 2000 -- how does that
6 work then? It's run in August but it says the data date is
7 July 4 -- I'm sorry, July 26, 2004.

8 How do they correlate?

9 A. Okay. This is real typical of how
10 construction updates are done. You take the latest file,
11 which would have been the July 26, '04, the project
12 completion file, and you prepare a blank with -- this is
13 called a blank report for status to be handwritten in for
14 the next update. And this would have been used on the next
15 time we updated.

16 Q. Okay. So this type of information on Exhibit
17 457 had nothing to do with your completion schedule?

18 A. No. I would have already had the completion
19 schedule prior to this.

20 Q. Okay.

21 MR. ANDERSON: Let's mark your completion
22 schedule as Exhibit 458, if we could.

23 And at this point we'll take a break for
24 lunch.

25 (Exhibit No. 458 marked.)

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1 (Recess from 12:15 p.m.
2 to 1:15 p.m.)
3 (All parties present.)

4 BY MR. ANDERSON:

5 Q. So the completion schedule dated July 28,
6 2004, was the first document you prepared as opposed to
7 printed off in this case; is that correct?

8 A. Correct.

9 Q. And this was to be used as a kind of a guide
10 for how the project was supposed to finish up based on what
11 was anticipated from that point forward?

12 A. Correct.

13 Q. So you have project completion out at November
14 28 or 29; correct?

15 A. It should say on the lower left-hand side.
16 Should be a date there for the project completion.

17 Q. November 27, 2004. All right.

18 Put that aside for the time being.

19 (Exhibit No. 459 marked.)

20 BY MR. ANDERSON:

21 Q. 459 is a fax from Barry Hayes to yourself
22 dated August 13, 2004, and in it --

23 MR. HAHN: Do you have a copy for me? Thank
24 you.

25 BY MR. ANDERSON:

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1 Q. And in it he says he's sending you a schedule
2 update. And at the end he says I have provided, in
3 essence, the owner a letter indicating we will take their
4 response as an approval of the schedule and will gather our
5 costs for this impact. Do you see that?

6 A. Yes, I do.

7 Q. Do you know what impact he's referring to?

8 A. I cannot recall.

9 Q. And he says if you need any additional
10 information contact me. And then he says, I'll have Curt
11 e-mail you each week with the update for this project.

12 Do you recall that that was part of your
13 agreement with SE/Z to monitor the schedule after you
14 prepared a completion schedule?

15 A. My understanding was that I was to prepare
16 updates on the schedule that I had prepared.

17 Q. Okay. And up through, let's say the middle of
18 August, you had been retained for approximately a month, do
19 you recall any discussion with anyone regarding the
20 preparation of a delay claim or an impact schedule?

21 A. I do not.

22 Q. All right. Now, in your files -- let's go
23 back to your files, if we could. Can you just tell me what
24 you recall the next event being that occurred in terms of
25 your involvement?

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1 MR. HAHN: You want him to look through the
2 documents or are you asking what he recalls?

3 MR. ANDERSON: Yes, let's have him look.

4 BY MR. ANDERSON:

5 Q. Can you stick that in at the '05 level and
6 then let me hand you this. You've got your personal file
7 over there, don't you?

8 A. We put that back in the box.

9 Q. Well, we need that out. That would be a bad
10 thing to put away.

11 All right. Why don't you pull that out if you
12 could and unband it.

13 A. Do you want to see what's in there?

14 Q. This probably requires you to go through that.
15 Why don't you tell me the next thing you see in terms of
16 your involvement, since we don't have some of these
17 records.

18 A. Well, just from looking at the paper it looks
19 like the next thing I would have been involved in would
20 have been an update in August of '04.

21 Q. Okay. Do you have an updated schedule?

22 A. I believe we had -- the only one that I saw
23 that was printed was a November update, but we had some
24 pulled out of the back of my stuff.

25 Q. Let's get to that in just a minute. Let me

24 (Pages 90 to 93)

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1 mark this as the next document in line. And we might as
2 well mark this one at the same time so you can look at them
3 at the same time.

4 (Exhibit Nos. 460 & 461 marked.)

5 BY MR. ANDERSON:

6 Q. Exhibits 460 and 461 are dated August 13th and
7 August 19th, respectively.

8 Do you recall this series of communications
9 where you were discussing the type of information you were
10 being provided regarding schedule updates?

11 A. Are you asking me a question on 460?

12 Q. Well, I notice that you aren't copied on 460,
13 but if you turn to 461 you -- this is Niru, your
14 consultant.

15 It starts out by saying the information as
16 transmitted by your superintendent is still not complete.

17 Did you have anything to do with this update?

18 A. I would have been involved in this, yes.

19 Q. Okay. Do you recall sending or having a blank
20 report sent to SE/Z?

21 A. I believe we've already looked at that. That
22 was one of your earlier exhibits is what they're referring
23 to in there.

24 Q. If you could find that that would be great, so
25 we can identify that.

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1 A. It looks like Exhibit 457 or 9?

2 Q. This is SE/Z 003719, Exhibit 457. So you
3 would -- strike that.

4 The form would be provided by WGK and then
5 filled in by SE/Z?

6 A. Correct.

7 Q. All right.

8 (Exhibit No. 462 marked.)

9 BY MR. ANDERSON:

10 Q. Does Exhibit 462 reflect that type of form and
11 how SE/Z was using it?

12 A. Yes, that's what it appears to be. Yes.

13 Q. And the purpose of having SE/Z provide that
14 kind of information was simply to allow WGK to prepare
15 updated schedules?

16 A. Correct.

17 (Exhibit No. 463 marked.)

18 BY MR. ANDERSON:

19 Q. 463 is a -- looks like a schedule dated August
20 4 -- August 30, 2004; do you see that?

21 A. Yes.

22 Q. Is this a schedule that WGK would have
23 prepared?

24 A. Yes, I believe we would have prepared this.

25 Q. All right. Would it be -- I don't know if you

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1 need to check or not -- based on the information contained
2 in Exhibit 462?

3 A. It appears to come off of information in
4 Exhibit 462, yes.

5 Q. Okay. And does Exhibit 462 give you any kind
6 of information regarding responsibility for the times that
7 are being reflected in terms of durations?

8 MR. HAHN: Object to the form.

9 THE WITNESS: No.

10 BY MR. ANDERSON:

11 Q. Does Exhibit 463 reflect any responsibility
12 for durations?

13 MR. HAHN: Object to the form.

14 THE WITNESS: No, it doesn't have any
15 responsibility coding in here.

16 BY MR. ANDERSON:

17 Q. Okay. And what would responsibility coding
18 be?

19 A. Well, typically on most projects we would put
20 responsibility coding for say -- if we're putting in
21 drywall we would have the drywaller or maybe his name, he's
22 responsible for that work. Things of that nature.

23 Q. Okay. Now down at the bottom of that first
24 page of 463 there is a bio lab division starting in the
25 4000 series; do you see that?

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1 A. Yes.

2 Q. And 4020 talks about a delay for welding fix
3 PR 21. Do you see that?

4 A. Yes.

5 Q. Do you know if that's something that WGK had
6 introduced into the schedule; or is that something that
7 SE/Z had introduced?

8 A. Well, as we saw in my notes when I went to the
9 job site, this exact note is on my notes.

10 Q. All right. Is this entry also on your
11 completion schedule? Can we take a look at that for a
12 second; Exhibit 458?

13 A. Yes, it is, 4020.

14 Q. Okay. Are there any other delays referenced
15 on either your completion schedule or Exhibit 463, the
16 August 30, 2004, update?

17 A. 5020 is noted but it relates to PR 21.

18 Q. And you're reading 5020 off of your original
19 completion schedule?

20 A. Yes. And also 3020, it also relates to PR 21.

21 Q. Now, on Exhibit 463 I don't see a 5020 --
22 unless these are out of order and it looks like they are.

23 A. Yeah, there is. And it looks like there's a
24 hole punched through the number.

25 Q. Okay. So if I'm understanding this correctly,

25 (Pages 94 to 97)

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1 in July and August of 2004 -- strike that. Let me just ask
2 the question this way.
3 Why, in July and August of 2004, was PR 21
4 involving a welding fix the only delay you were showing?
5 A. Because it was -- at that time was the only
6 thing that we knew was holding up all of the above ceiling
7 work. It was holding up everything else in the structure.
8 Q. Okay. Were there other delays you were aware
9 of?
10 A. Not at this time, I don't believe.
11 Q. So the reason it's reflected on these
12 schedules 463 and 458, is that it's the only delay that you
13 were aware of?
14 A. At that time, yes.
15 Q. Now, in order to get to this point in the
16 project where work was being done at this particular
17 juncture, August and July of 2004, there had been other
18 events that had transpired on the project; correct?
19 MR. HAHN: Object to form.
20 THE WITNESS: I didn't know at that time.
21 BY MR. ANDERSON:
22 Q. No one had told you that the project had
23 originally been planned to complete prior to July and
24 August of 2004?
25 A. Yes, I was told it was prior to complete --

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1 prior to when I was there. But I wasn't -- it didn't
2 matter to me what had happened. I was just trying to get a
3 completion schedule.
4 Q. Okay.
5 MR. COMSTOCK: Rob, it looks like we're
6 missing the odd numbered pages.
7 MR. HAHN: I think they're out of order.
8 (Discussion off the record.)
9 (Exhibit No. 464 marked.)
10 BY MR. ANDERSON:
11 Q. All right. Exhibit 464 appears to be a
12 September 29, 2004, memo that you prepared to Barry Hayes.
13 Do you see that?
14 A. Yes.
15 Q. And it's entitled Category of Cost for
16 Extended Time Request; correct?
17 A. Correct.
18 Q. What would be the purpose of obtaining that
19 kind of information with that kind of a title?
20 A. Well, obviously at this point they must have
21 had discussions with me concerning dollars they had lost
22 during this suspension period. And how can we recoup those
23 -- what's the way to show to recoup those dollars. And
24 this looks like my notes of all the things I could think of
25 that they could possibly recoup.

1 Q. Okay. Now, on the second page there's a
2 different set of date parameters; correct?
3 A. Uh-huh.
4 Q. In this section you ask for additional types
5 of information; correct?
6 A. Yes.
7 Q. On either of those pages do you request
8 information from the mechanical engineer, the architect, or
9 the owner?
10 A. Not on these two sheets, no.
11 Q. Okay. But this would be the format in which
12 you would ask for that kind of information; correct?
13 A. Possibly.
14 Q. Well, it's the format you used to ask for this
15 information; isn't it?
16 A. Yeah. But I was just asking for cost
17 information here.
18 Q. Okay. And generally, well, I guess you have
19 -- the heading is on there and kind of ruins my question;
20 doesn't it.
21 What you were looking for is home office and
22 field overhead costs; right?
23 A. Correct.
24 Q. All right. Now, at the time --
25 MR. HAHN: Keen eye for the obvious.

1 MR. ANDERSON: I have an uncanny knack.
2 BY MR. ANDERSON:
3 Q. In September of 2004 had you reviewed the
4 contract?
5 A. I can't recall.
6 Q. Had you reviewed the general conditions?
7 A. I can't recall. I'm sure I would have looked
8 at the general conditions but I can't recall.
9 Q. Okay. Do you recall a specific time where you
10 actually sat down and reviewed the general conditions of
11 the contract?
12 A. I cannot recall.
13 Q. Okay. Do you think that it would have been
14 important to do so to make sure that any requests for costs
15 associated with the delay were permitted by the contract?
16 A. Possibly.
17 Q. Well, you wouldn't want to ask for something
18 that's not allowed by the contract, would you?
19 A. Well, on my list -- my list -- what it looks
20 like I'm doing here is I'm asking for every possible cost
21 that could be accounted for.
22 Q. Okay.
23 A. That's what I'm asking for.
24 Q. And then did you anticipate perhaps having to
25 narrow it down later in terms of what the contract actually

26 (Pages 98 to 101)

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1 allowed?

2 A. Possibly. I do the same thing on time issues.

3 I ask for every available time issue and I throw out the

4 ones that don't impact the job.

5 Q. Okay.

6 (Exhibit No. 465 marked.)

7 BY MR. ANDERSON:

8 Q. What is Exhibit 465?

9 A. It looks like a blank report on which an

10 update would be prepared.

11 Q. Would that be a document that WGK would

12 prepare or SE/Z would prepare?

13 A. We would have prepared this document.

14 Q. Internally?

15 A. Internally, and sent it to SE/Z.

16 Q. Okay. What would have been the basis for the

17 input or data on this report? And for the record, it's

18 called a third update October 21, 2004; correct?

19 A. Mine's called fourth update.

20 Q. Wrong one; never mind.

21 Fourth update blank '04; correct?

22 A. Correct.

23 MR. ANDERSON: Let's mark that.

24 (Exhibit No. 466 marked.)

25 BY MR. ANDERSON:

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1 Q. If you could compare Exhibits 465 and 466 with

2 each other, do they corollate in some fashion?

3 A. Somewhat. They're somewhat similar but

4 there's more information on 466.

5 Q. You wouldn't call that a blank report, would

6 you?

7 A. No.

8 Q. All right. Well, let's turn to 466, then. If

9 you could, please tell me if this is something that WGK

10 produced internally.

11 A. We would have printed this report; correct.

12 Q. Okay. Would you have also inputted the data

13 that was printed out when this report was printed?

14 A. We would have input the data.

15 Q. And where would the data have come from?

16 A. From SE/Z.

17 Q. And how would that have been provided to you,

18 if you know?

19 A. Probably by way of a marked up blank report,

20 and possibly some telephone conversations.

21 Q. Now, on Exhibit 466, the right-hand column has

22 a title of Total Float; do you see that?

23 A. Yes.

24 Q. Has a lot of minus numbers. What was the

25 significance of those numbers, if any?

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1 A. Those numbers -- I can't be certain -- but

2 they appear to denote the number of work days the project

3 is behind the contract date.

4 Q. All right. Is that speculation, or is that

5 your recollection?

6 A. Well, I can only -- I think I'm pretty

7 accurate in what I just said. I do not have all the data

8 to show me the calculation mode to get these negative

9 numbers. But I would suspect that that's what the -- it's

10 calculating off of the latest date for the contract. And

11 these are in work days.

12 Q. What was the original completion date for the

13 contract, if you recall?

14 A. May of '04, I think. Something May of '04.

15 Q. Well, let's take the first entry, ceiling

16 patch and finish. It looks like it's got kind of early

17 finish of October 2004, and a late finish of May 2004. How

18 does that work; or is that incorrect?

19 A. No, that's what it shows. Basically if the

20 early and late dates are the same, for the same date, it's

21 a zero float path.

22 If the early date is later than the late date,

23 it shows a negative float path. It's the difference

24 between those two dates, that's what the computer is

25 calculating.

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1 Q. Okay. And why would one have that on a

2 schedule update?

3 A. It's typical information we print.

4 Q. For what purpose?

5 A. Well, we can try to monitor -- what this

6 schedule projects is the critical path and where it's

7 projecting when items are going to be completed.

8 Q. How does this schedule tell us the critical

9 path? I don't see any logic ties.

10 A. Well, it would take some work, but we could

11 determine the critical path off of this.

12 Q. How?

13 A. We'd follow these float paths and connect the

14 dates shown on each float path.

15 Q. There's probably an easier way to do it than

16 off of this particular update; isn't there?

17 A. If I had my computer and this file, yes.

18 Q. How would you do it if you had those items?

19 A. I would just ask the computer to tell me what

20 the critical path was.

21 Q. All right. And if there's been a schedule

22 printed off based on this data shown on Exhibit 466, you

23 could tell it to show the critical path through the various

24 items?

25 A. Sure. You could tell it to show a variety of

Page 106

1 paths, yes.
 2 (Exhibit No. 467 marked.)
 3 BY MR. ANDERSON:
 4 Q. Exhibit 467 is an October 21, 2004, fax from
 5 Barry Hayes to Niru and Phil. That would be Phil Gudge
 6 again?
 7 A. It would be, yes.
 8 Q. And the attachment appears to be a field
 9 overhead breakdown; is that accurate?
 10 A. That's what it appears to be.
 11 Q. Of \$286 for a total?
 12 A. Correct.
 13 Q. Why was this necessary -- do you know why this
 14 was being requested in October of 2004?
 15 A. I cannot recall.
 16 Q. It also looks like it's for a different
 17 project.
 18 A. Yes, I just noticed that. It's for an
 19 elementary school.
 20 Q. Do you know if this was a different job that
 21 WGK was working on for --
 22 A. I don't know for certain --
 23 Q. -- SE/Z?
 24 A. -- but we've done several SE/Z schedules so
 25 it's possible this is for a totally different project; not

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1 this project.
 2 Q. Or perhaps showing rates for field overhead
 3 from a different project for use on this project?
 4 A. Possibly.
 5 Q. Okay. All right.
 6 (Exhibit No. 468 marked.)
 7 BY MR. ANDERSON:
 8 Q. Exhibit 468 looks like it was faxed on October
 9 21, 2004. It has some handwriting at the top. It's a blank
 10 report to use for October update; do you see that language?
 11 A. I see that.
 12 Q. And then it looks like somebody might have
 13 filled it in and then sent it back to WGK; does that
 14 look like --
 15 A. That looks --
 16 Q. -- what happened?
 17 A. -- like what happened.
 18 Q. And this would just be additional information
 19 regarding the actual progress of the job?
 20 A. Correct.
 21 Q. Is there anything on here that deals with
 22 responsibility for any time durations that might be
 23 developing on the job?
 24 MR. HAHN: Object to the form.
 25 THE WITNESS: I don't believe so. This is

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1 strictly for the completion of the project.
 2 BY MR. ANDERSON:
 3 Q. All right. Now, in the claim materials marked
 4 as Exhibit 449 from the mediation statement, which had all
 5 of the exhibits for the claim for damages set forth by
 6 SE/Z, I'd ask you to turn again to your invoices that we
 7 looked at a little while ago.
 8 And as I look at them I see one for July,
 9 August, September, and October, of 2004. Then they jump to
 10 March of 2005.
 11 The materials that I've been able to review
 12 before we got your file, do not include anything from
 13 October -- late October until sometime in February of 2005.
 14 Do you know of any activity that WGK engaged in for this
 15 project between late October 2004 and February of 2005?
 16 A. I do not recall.
 17 Q. Okay. Why don't you take a look at your
 18 personal file and see if we've moved through everything
 19 that involves 2004, or at least touched upon it.
 20 A. It appears we've moved beyond 2004.
 21 Q. Okay. I'll hand you this stack of schedules.
 22 What does that consist of?
 23 A. It appears these are original documents that
 24 SE/Z must have sent us. The first part of this is the
 25 approved initial schedule noting an approval date of

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1 October 7, 2003.
 2 Q. Is there a receipt stamp on that?
 3 A. I do not see one. I just see the approval
 4 stamp.
 5 MR. HAHN: A transmittal stamp.
 6 BY MR. ANDERSON:
 7 Q. Is there a transmittal date of any type?
 8 A. Well, it looks like it's September 24, is when
 9 it was transmitted.
 10 Q. 2000 --
 11 A. 2003. So approximately two weeks later it was
 12 approved.
 13 MR. ANDERSON: Why don't we mark those -- that
 14 whole exhibit.
 15 BY MR. ANDERSON:
 16 Q. Let me see what else is in that exhibit before
 17 we mark it; put it that way.
 18 A. It looks like some earlier schedules that were
 19 probably prepared by SE/Z, they look like they're prepared
 20 on Sure Track.
 21 There is a transmittal and backup with a
 22 transmittal. It looks like a scheduling update for January
 23 of '04. It looks like the first update. And this schedule
 24 was rejected. And the note shows that it was rejected
 25 because the completion date was beyond the contract date.

28 (Pages 106 to 109)

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1 Q. And the transmittal is from whom to whom?
 2 A. From -- this transmittal comes from Rudeen &
 3 Associates to Barry Hayes, SE/Z.
 4 Q. Okay. Okay.
 5 A. Then there's some additional scheduling
 6 information from SE/Z. And there's some type of update
 7 April of '04 from SE/Z transmitted to everyone. I guess
 8 all the subs. And one more schedule from SE/Z.
 9 These are all SE/Z prepared document.
 10 Q. Okay.
 11 MR. ANDERSON: Let's go off the record.
 12 (Discussion off the record.)
 13 (Exhibit Nos. 469 & 470 marked.)
 14 BY MR. ANDERSON:
 15 Q. Exhibit 470 is a letter from Barry Hayes to
 16 Randy Frisbee. I'll represent to you that there are
 17 similar letters to a number of other subcontractors in the
 18 file. And attached to this document is your memo; is that
 19 correct?
 20 A. Yes.
 21 Q. And the memo requested a variety of kinds of
 22 cost information?
 23 A. Correct.
 24 Q. And you sent that memo back in September of
 25 2004. I'm looking at Exhibit 469.

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1 A. Yes, that's what it appears.
 2 Q. Okay. And the copy, or the letter portion of
 3 this exhibit, states SE/Z will be submitting a claim for
 4 delays to this project through December 31, 2004, to DPW.
 5 Would the combination of Exhibit 470 and
 6 Exhibit 464, which is the September 29 memo, indicate that
 7 you were aware in September of 2004 that SE/Z was planning
 8 on presenting a cost claim for delays?
 9 A. No, I can't definitely say I knew in September
 10 of '04. Obviously I was asked what categories of costs
 11 should we try to keep track of, and that's what it looks
 12 like I was doing there.
 13 Q. It wouldn't have surprised you if there was a
 14 delay claim based on those cost categories; would it?
 15 A. I guess I don't understand your question.
 16 Q. If in September somebody asked you what
 17 categories of cost shall we be tracking, it wouldn't
 18 surprise you that they wanted to file a delay claim.
 19 A. No. If I was asked that, no.
 20 Q. All right. Would it be more reasonable than
 21 not that in September, when you were asked about these cost
 22 categories, that you were made aware in some fashion that
 23 there would be a delay claim?
 24 A. Possible.
 25 Q. Okay. Independent of any of the documents

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1 we've seen, do you recall any work on such a claim up to
 2 approximately February of 2005?
 3 A. I do not recall.
 4 Q. All right. We've been going a little while
 5 and looked at various documents. Has anything come to mind
 6 in terms of a second trip to Boise?
 7 And I'll just help you out, up through
 8 February of 2005?
 9 A. No, there's no document to support that. And
 10 I can't recall. It seems I was here twice, but I can't
 11 recall.
 12 (Exhibit No. 471 marked.)
 13 BY MR. ANDERSON:
 14 Q. This is a March 2, 2005, memo from Steve
 15 Zambarano to yourself. Reading that e-mail, would it be
 16 pretty clear that from this point forward your job was to
 17 assist with a delay claim?
 18 A. Yeah. Like I stated much earlier in this
 19 deposition, I did recall in early 2005 is when the process
 20 began to try to substantiate and support a delay claim.
 21 (Exhibit No. 472 marked.)
 22 BY MR. ANDERSON:
 23 Q. Is 472 your response?
 24 A. It appears to be, yes.
 25 Q. In it you say attached is my original

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1 requested document list -- which we looked at dated
 2 September 29, 2004 -- and then it says, and the completion
 3 schedule data report.
 4 The only thing that we found attached was a
 5 fourth update dated November 30, 2004. Are they the same
 6 thing?
 7 A. Be the same thing.
 8 Q. Okay. And what is the attachment to this
 9 Exhibit 472 at the end which is entitled fourth update?
 10 What is that? Is that just a schedule update?
 11 A. It's just a schedule update. It happens to be
 12 printed in what's called rich text. It's a different
 13 printing method in Primavera. It just looks different.
 14 Q. Okay.
 15 A. I can identify that from the graphics.
 16 Q. Near the end of that document I see on page
 17 SE/Z 002128, down near the bottom of -- and under project
 18 completion, 9029, which is the hot gas bypass; 9040, delay
 19 mechanical submittals; and 9060, delay electrical
 20 submittals.
 21 What are those entries referring to?
 22 A. At this time we must have started monitoring
 23 some of the change request information.
 24 Q. Would that be the same answer for the next
 25 three items on the following page?

29 (Pages 110 to 113)

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1 A. Correct.
2 Q. CCD 7 and 8 regarding the platform, and then
3 some other PRs and RFLs.
4 A. Correct.
5 Q. And by monitoring it, what -- you have a
6 duration listed. For example, let's go to the last page.
7 Activity ID 9080, CCD 7 and 8, platform issue. Do you
8 recall what platform that refers to?
9 A. That would have been the platform outside the
10 bio lab, I believe. It would have been -- there was a
11 redesign of the platform outside the -- either the make-up
12 air handling units or something like that.
13 Q. Okay. And it has an original duration column,
14 and under it it has -- looks like 16 days; is that correct?
15 A. Correct.
16 Q. Do you know where that information came from
17 in terms of the number of days?
18 A. I cannot recall.
19 Q. And it says remaining duration, I believe is
20 the next column. And it says zero, and obviously that's
21 percent complete is 100. Does that mean that that issue
22 has worked its way through the schedule and is complete?
23 A. On this update, yes. It shows it's complete
24 on this update.
25 Q. And you actually have an actual finish date

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1 off to the right?
2 A. Correct.
3 Q. And that would be information provided to you
4 by someone at SE/Z?
5 A. Probably SE/Z, yes.
6 Q. Up to this point in time, March of 2005, had
7 you been provided any daily reports?
8 A. I can't recall.
9 Q. You did some work on Lea Electric's claim?
10 A. I just compiled their information, yes.
11 Q. Okay.
12 (Exhibit No. 473 marked.)
13 BY MR. ANDERSON:
14 Q. Would this be the type of information that
15 you'd receive from Lea Electric that you say you compiled?
16 A. Yes.
17 Q. Tell me what you mean by compiling it. If you
18 got information from Lea would you just insert it into your
19 materials?
20 A. I'd probably look at it. I would probably try
21 to make sure there were no math errors. And then I would
22 insert it in the request booklet.
23 Q. Did you look for backup for any of the time
24 that was claimed?
25 A. I recall trying to verify as much as I could

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1 of time sheets that related to hours and things of that
2 nature, yes.
3 Q. Now, there are some time slips, or time sheets
4 attached; correct?
5 A. Correct.
6 Q. How did you use them, if at all?
7 A. Well, let's go to an example of one. If you
8 look at Lea Electric's original transmittal sheet here,
9 there's -- and it's dated -- okay, it's SE/Z document
10 002107.
11 Q. Right.
12 A. If you look at item 4, removal materials on
13 June 29, '04. They show two hours. They have a backup
14 time record for that exact date as SE/Z document 002115
15 that shows remove stored materials and it shows the two
16 hour time.
17 Q. Okay. If they had not provided this type of
18 backup, would you have requested it to make sure that
19 information you were compiling was accurate?
20 A. We would have requested it. And if we didn't
21 receive it we would have asked them to certify that the
22 information was available.
23 Q. And certify means what?
24 A. Means that they would guarantee that the
25 information was someplace in their offices, and that they

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1 could account for it.
2 Q. All right. Because you knew that this was a
3 project that had some federal funds?
4 A. Correct.
5 Q. And you knew if there's a fraudulent claim
6 submitted there could be a fraudulent claim act proceeding?
7 A. Correct.
8 Q. And you didn't want to be a part of that; did
9 you?
10 A. No.
11 Q. Because you were preparing a claim for SE/Z?
12 A. Correct.
13 Q. Did you make that clear to Hobson?
14 A. Yes.
15 Q. Would you audit the information in any way
16 being provided by Hobson in terms of hours for various
17 individuals or activities?
18 A. We didn't do an audit of their information,
19 no. We spot-checked many of their dollars and backup.
20 Q. And if you couldn't find the backup you'd say
21 hey, I can't find it, will you at least certify that this
22 is accurate?
23 A. Yes.
24 Q. And if it wasn't accurate would that cause you
25 to be concerned about the accuracy of any other portions of

30 (Pages 114 to 117)

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<p style="text-align: right;">Page 118</p> <p>1 their claim?</p> <p>2 A. I guess I'm confused on your question.</p> <p>3 Q. Fair enough. If it turns out that a portion</p> <p>4 of Hobson's claim was inaccurate in terms of the number of</p> <p>5 hours some individual or individuals worked on this</p> <p>6 project, would that cause you to be concerned about some of</p> <p>7 the other information you were receiving from Hobson?</p> <p>8 MR. HAHN: Object to the form.</p> <p>9 THE WITNESS: Sure. If you found something</p> <p>10 that was inaccurate, it would -- it would give you pause to</p> <p>11 look more closely at other information they had. That's</p> <p>12 correct.</p> <p>13 BY MR. ANDERSON:</p> <p>14 Q. Did you ever speak directly with Ted Frisbee</p> <p>15 about this project?</p> <p>16 A. Yes.</p> <p>17 Q. How many times?</p> <p>18 A. I can't recall. More than once.</p> <p>19 Q. How many times in person?</p> <p>20 A. At least twice.</p> <p>21 Q. You mean two consecutive days?</p> <p>22 A. Yes.</p> <p>23 Q. Okay. Was Mr. Frisbee present during your</p> <p>24 first visit to the lab?</p> <p>25 A. I believe he was.</p>	<p style="text-align: right;">Page 120</p> <p>1 Hobson's delay claim will look like.</p> <p>2 And the next exhibit is 475 and it looks like</p> <p>3 the type of chart that Hobson ultimately used in its</p> <p>4 request for equitable adjustment. Do you recognize it as</p> <p>5 such?</p> <p>6 A. Yes, this looks typical to what Hobson -- I'm</p> <p>7 looking at 475?</p> <p>8 Q. Yes.</p> <p>9 A. Typical to the information they had.</p> <p>10 Q. Okay. Did you understand this to be an</p> <p>11 encapsulation of what Hobson believed to be its delay</p> <p>12 damages through the end of the year of 2004?</p> <p>13 A. The only one that notes what time period it's</p> <p>14 through is SE/Z 002101 from RM Mechanical. They definitely</p> <p>15 state it's through December 31 of '04. But I do not see</p> <p>16 those notes on any of the other documents.</p> <p>17 Q. Okay. Let's turn to the third page of SE/Z --</p> <p>18 I'm sorry, the first page of 475. This is the chart from</p> <p>19 Hobson dated March 15, 2005, and it has various entries on</p> <p>20 it.</p> <p>21 When you got this document what did you</p> <p>22 understand your role was going to be with respect to</p> <p>23 Hobson's claim for delay?</p> <p>24 A. Hobson was going to certify their own damages</p> <p>25 and we were going to insert it as part of the claim.</p>
<p style="text-align: right;">Page 119</p> <p>1 Q. And was he telling you about some of the</p> <p>2 events that had transpired at the lab and during the</p> <p>3 pendency of the project?</p> <p>4 A. He might have. I don't recall. But he might</p> <p>5 have. I was more interested in trying to get the job</p> <p>6 finished. So I was looking forward, not behind.</p> <p>7 Q. All right. But starting in February and March</p> <p>8 of 2005, you were starting to look at the entire project in</p> <p>9 terms of the delay claim correct?</p> <p>10 MR. HAHN: Object to the form.</p> <p>11 THE WITNESS: Correct.</p> <p>12 BY MR. ANDERSON:</p> <p>13 Q. And do you recall speaking with Mr. Hobson at</p> <p>14 that point in time?</p> <p>15 A. I don't recall. I seem to have had a</p> <p>16 conversation with him on the phone once or twice, but I</p> <p>17 don't really recall.</p> <p>18 Q. Okay.</p> <p>19 (Exhibit Nos. 474 and 475 marked.)</p> <p>20 BY MR. ANDERSON:</p> <p>21 Q. I have to tell you I don't know if these go</p> <p>22 together or not, but I'll try to find out.</p> <p>23 474 looks like an e-mail Steve Zambarano sent</p> <p>24 to you on March 17, 2005. And it includes an e-mail from</p> <p>25 Mr. Frisbee that purports to attach a sample of what</p>	<p style="text-align: right;">Page 121</p> <p>1 Q. Okay. Did you think it was important that</p> <p>2 SE/Z's claim track Hobson's claim in terms of the number of</p> <p>3 days of delay?</p> <p>4 MR. HAHN: Object to the form.</p> <p>5 THE WITNESS: Well, subcontractors' time</p> <p>6 frames for delay are not always equal to general</p> <p>7 contractors.</p> <p>8 BY MR. ANDERSON:</p> <p>9 Q. Is that your answer to my question?</p> <p>10 A. That's my answer to your question.</p> <p>11 Q. All right. Did you think it was important</p> <p>12 that Hobson's view of various events in terms of who was</p> <p>13 responsible, match SE/Z in order to have a valid claim?</p> <p>14 A. There should be common ground in the two</p> <p>15 approaches; that's correct.</p> <p>16 Q. It would be odd if you had the general</p> <p>17 contractor saying well, that particular event was caused by</p> <p>18 the owner, and the subcontractor saying that same</p> <p>19 particular event was caused by someone else; wouldn't it?</p> <p>20 A. It would not be unusual. We found that on</p> <p>21 other claims. If that was really the case, I would have</p> <p>22 apportioned some of the days -- let's say for the</p> <p>23 mechanical, not against the owner but against some other</p> <p>24 party.</p> <p>25 Q. Well, let's step back before you got this</p>

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1 report from Hobson. Did you have any discussions with SE/Z
2 and Hobson personnel in terms of how the two different
3 claims needed to mesh, question mark.

4 MR. HAHN: What was your time frame?

5 BY MR. ANDERSON:

6 Q. Anytime prior to receiving this chart on March
7 15, 2005.

8 A. I do not recall having those conversations.

9 Q. Now, when you got this, would this be the
10 first time you had received any indication of what Hobson
11 believed it was owed due to delays that had occurred up to
12 December 31, 2004?

13 A. For what I can recall. I don't recall
14 receiving any information until early 2005, cost
15 information.

16 Q. Given that answer, would this be the first
17 chart from Hobson that you had seen their damages set out
18 on?

19 A. Possibly. Hobson has a lot of charts.

20 Q. Yes, they do. Now, did you consider it your
21 role on this project in terms of the, I guess the new hat
22 you were wearing, the preparer of a delay claim, to look
23 into the claims being made by Hobson?

24 A. As far as what?

25 Q. Whether they were valid, whether they made

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1 events, I would have passed that on to SE/Z and told them
2 to pass that on to their subs. So yes, the days of delay
3 would have been uniform.

4 I would have asked them to do that. I did not
5 contact these subcontractors outside of SE/Z.

6 Q. Let me make sure I understand. Are you saying
7 you would come up with the number of days of delay, and
8 then transmit that to SE/Z and to its subs?

9 A. Yes.

10 Q. So at some point prior to March 15, 2005,
11 you'd come up with days of delay attributable to the owner
12 or the design team up to the end of 2004?

13 A. Possibly, yes.

14 Q. Well, what would you have to look at to be
15 more certain of your answer?

16 A. Well, I don't think there's any graphic that
17 is prepared in that time frame. But I obviously prepared
18 one. I just don't see a copy of it.

19 Q. What would it be entitled? Would it be an
20 impact schedule?

21 A. It probably would have been a preliminary type
22 of schedule we would have done. We were not done with our
23 analysis, so we wouldn't have prepared a final chart or
24 anything.

25 Q. Okay. But it would have been a preliminary

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1 sense, whether they were accurate, whether they tracked
2 conventional wisdom in the construction industry, or
3 conventional practice in terms of how claims were set out;
4 any number of things.

5 MR. HAHN: Object to the form.

6 THE WITNESS: We would definitely be looking
7 for consensus among the parties that everything was valid
8 they were asking for.

9 BY MR. ANDERSON:

10 Q. All right. And I guess you found it in this
11 early material because it looks like Hobson was taking the
12 position that not one day of delay up through the end of
13 2004 was attributable to anybody other than the owner or
14 the design team; correct?

15 A. Hobson wasn't telling me how many days of
16 delay things took. They wouldn't have told me that.

17 Q. Well, it has 140 days; doesn't it?

18 A. He might have taken it off of my stuff.

19 Q. What stuff did you have 140 days on?

20 A. Off of one of my graphics I prepared. I'm not
21 really sure where he came up with his days.

22 Q. Was that important for the person compiling
23 the delay claim to know just how Hobson was calculating its
24 delay claim?

25 A. When I would have determined days of delay for

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1 chart showing what you considered to be the days of delay
2 attributable to parties other than the owner or the
3 subcontractor?

4 A. Attributable to anyone on the project.

5 Q. And have you seen that type of document today
6 as we went through your file?

7 A. I've not seen an early document like that.

8 I've seen a later document that shows those type of things

9 Q. And would that be the time impact graphic that
10 we've discussed?

11 A. Correct.

12 Q. The one we've discussed, do you have -- we
13 have the big version in the back of the REA, don't we?

14 Why don't you pull that one out, if you could.

15 And if I could, what other chart is in there?

16 A. This is strictly a chart showing CISs, COs,
17 RFIs, I plotted across the project.

18 Q. Was it prepared in conjunction with the REA?

19 A. Yes, it would have been part of that
20 information pulled out a different way.

21 And here is the time impact graphic. This is
22 on a smaller version. It's a D size versus the E size.
23 It's the same as this big one. Would be the same as this.

24 Q. Okay.

25 A. It's the same thing.

32 (Pages 122 to 125)

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1 Q. Could we mark one of these?
 2 A. Mark that one. That would be your copy.
 3 MR. ANDERSON: Okay. Let's mark that as the
 4 next exhibit in line, please.
 5 (Exhibit No. 476 and 477 marked.)
 6 BY MR. ANDERSON:
 7 Q. Now, we marked Exhibit 476, which is the time
 8 impact graphic included with the REA. And this would be
 9 the final version of how WGK understood the project
 10 developed over the life of the project?
 11 A. Correct.
 12 Q. And from this document you were able to
 13 calculate 332 days of delay?
 14 A. Correct.
 15 Q. With respect to that final number, how was it
 16 arrived at?
 17 A. How was the number arrived at?
 18 Q. The 332 days.
 19 A. I'll give you the short version of how we
 20 arrived at that number.
 21 Q. Okay.
 22 A. We put together an as-built schedule. We --
 23 Q. Now, let me -- I apologize for interrupting.
 24 You would not consider the time impact graphic the as-built
 25 schedule, would you?

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1 A. No. This is the summary of some of that
 2 information.
 3 Q. All right. Where is the as-built schedule to
 4 which you just referred?
 5 MR. ANDERSON: Why don't we go off the record.
 6 (Brief recess.)
 7 BY MR. ANDERSON:
 8 Q. Were you able to locate the as-built schedule?
 9 A. No. I never found the as-built printout. I
 10 don't recall ever printing one.
 11 Q. Wouldn't it be an integral part of your delay
 12 analysis?
 13 A. It would actually -- the end result of that
 14 as-built would be this graphic.
 15 Q. That's not my question. Would the as-built
 16 schedule be an integral part of your delay analysis?
 17 A. Yes, it would be.
 18 Q. It would be a necessary step to get to the
 19 time impact graphic?
 20 A. Yes.
 21 Q. What do you have in your files, either hard
 22 copy or electronic, that would relate to the as-built
 23 schedule?
 24 A. It would have to be this time impact graphic.
 25 Q. And the time impact graphic is developed off

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1 of the as-built schedule?
 2 A. It's part of the as-built schedule.
 3 Q. How so?
 4 A. Well, some of these activities I have I can
 5 tell they're summary activities. Contract work I've
 6 summarized. Instead of having multiple activities I've
 7 summarized them down into just one event.
 8 Q. And on the as-built schedule you would have
 9 more detail?
 10 A. There would probably be more detail but it
 11 would be the same events. Just more detail.
 12 Q. Okay. In fact there's no events; it just says
 13 contract work.
 14 A. Contract work.
 15 Q. What other differences would there be?
 16 A. That would probably be it. That would be the
 17 only difference.
 18 Q. Now, is the time impact graphic kept
 19 electronically somewhere in your office?
 20 A. If it is I would have sent it to Mr. Hahn. I
 21 sent him all the electronic files we had.
 22 Q. Okay. But you kept what you had, you just
 23 sent him a copy?
 24 A. Yes.
 25 Q. Okay. And --

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1 MR. HAHN: Have you checked your disk?
 2 MR. ANDERSON: Not in the last two minutes,
 3 haven't.
 4 MR. HAHN: Because I simply passed on what I
 5 received. I don't have the software to open it.
 6 MR. ANDERSON: And neither do we because it
 7 was Primavera.
 8 MR. HAHN: Right.
 9 THE WITNESS: But this is DOS Primavera.
 10 BY MR. ANDERSON:
 11 Q. Would the as-built schedule have been
 12 Primavera?
 13 A. This is DOS Primavera. This is what I have
 14 done it in.
 15 Q. Okay. Do you feel you need the as-built
 16 schedule to explain your time graphic -- time impact
 17 graphic?
 18 A. I felt this explained it clear enough. This
 19 is a summary of what I had done.
 20 Q. What information don't we have on the time
 21 impact graphic that would have been on the as-built
 22 schedule?
 23 A. Some more detail for the construction events.
 24 Normal, original contract work events.
 25 Q. The time impact graphic is one page; correct?

33 (Pages 126 to 129)

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1 A. Correct.
 2 Q. And the as-built construction schedule would
 3 have been multiple pages?
 4 A. Yes.
 5 Q. It would have shown start and stop dates for
 6 various activities along the way?
 7 A. Correct.
 8 Q. Tell me how you prepare the time impact
 9 graphic once you've prepared the as-built schedule?
 10 Is this -- for example, is the time impact
 11 graphic a form that you can get out of Primavera or is it
 12 something you came up with on your own?
 13 A. This -- this information you can get out of
 14 Primavera but there has to be someone who knows how to use
 15 it the proper way to gather the amount of, you know,
 16 impact.
 17 Q. Is there any judgment involved in what you put
 18 down on your time impact graphic which is marked as --
 19 what's the Exhibit?
 20 MR. HAHN: 476.
 21 MR. ANDERSON: Thank you.
 22 THE WITNESS: Yes, there's some judgment
 23 involved in this.
 24 BY MR. ANDERSON:
 25 Q. What judgment calls did you have to make?

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1 A. I don't recall right now but there's always
 2 judgement calls.
 3 Q. Let me just ask you some questions. Did you
 4 actually prepare the time impact graphic?
 5 A. Yes, I would have prepared this.
 6 Q. All right. How do we know? Do you have your
 7 initials on there? Is there some way to tell it wasn't a
 8 -- I think you call them consultants. Would that be like
 9 an associate?
 10 A. Right.
 11 Q. A nonprincipal?
 12 A. Yes.
 13 Q. How do we know you prepared this?
 14 A. Because I'm one of the only ones in my office
 15 that can use the DOS program.
 16 Q. And why is that? Because it's so many steps
 17 behind what they're using?
 18 A. Yes.
 19 Q. Is the newer version more accurate or in some
 20 way reliable?
 21 A. No.
 22 Q. Why do you use the older version?
 23 A. DOS has the capability of doing some graphic
 24 things that we show on here that you can't do in Windows.
 25 Q. Like what?

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1 A. We could never have drawn these impact lines.
 2 It would take forever in Windows to do this. DOS it's very
 3 simple. DOS is very straightforward. Calculation wise,
 4 it's actually the same -- gives you the same results. Just
 5 the graphics -- some of the graphic input. The other thing
 6 that DOS is 100 times better than the Windows version is if
 7 you have to put dollar resources into a schedule. DOS
 8 prepares an almost like an Excel spreadsheet type of window
 9 that you can just start typing in dollars, where Windows
 10 you have to do one activity at a time. It's very slow.
 11 You have to click, do it, click, do it. DOS you can just
 12 scroll and have the whole thing in front of you and just
 13 start typing.
 14 So DOS has some advantages over Windows.
 15 Primavera pushes Windows because they're always pushing new
 16 software. Doesn't mean it's better.
 17 Q. All right. On the time impact graphic you
 18 have the number of days of the original contract; correct,
 19 267?
 20 A. Correct.
 21 Q. And you determined that from what source?
 22 A. That would have been probably from the
 23 original contract. Also I would have verified that with
 24 SE/Z.
 25 Q. All right. Was there an earlier version of

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1 the time impact graphic?
 2 A. I don't recall there being one; but I really
 3 don't...
 4 Q. Okay. And did you determine the duration and
 5 start and finish dates of the original contract from the
 6 document itself, the contract itself?
 7 A. I guess I'm confused on your question again.
 8 Q. I'm just asking how -- it might be the same
 9 question as earlier. You either relied on SE/Z or the
 10 contract for that information?
 11 A. Correct. To get the original start date and
 12 the original completion date.
 13 Q. All right. Now you've got -- the next entry
 14 is 41 -- CDs are calendar days for time granted by the
 15 owner; correct?
 16 A. Correct.
 17 Q. Do you have a compilation of the change orders
 18 that would support that 41-day period?
 19 A. Yes. And I believe it's in this information
 20 we've looked at. Maybe there's two or three copies.
 21 Q. Pull that out. I'll let you pull that out so
 22 we can keep going through some of it.
 23 What you've handed me is some handwritten
 24 notes with various change orders attached?
 25 A. Yes.

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1 Q. Okay.
 2 A. And the small packet there is the change
 3 orders that time was granted on. And the large packet, I
 4 think, is every change order.
 5 Q. Okay. In addition, on the large packet there
 6 are some summarizes from Mr. Blough near the end. Is there
 7 a reason why they're included in that group of documents?
 8 Are they related in some way?
 9 A. No. I don't really know why they were
 10 included, they just are.
 11 MR. ANDERSON: Okay. Why don't we mark the
 12 document with your change order summary as the next
 13 exhibit.
 14 (Exhibit No. 478 marked.)
 15 BY MR. ANDERSON:
 16 Q. Is that your handwriting --
 17 A. No, that's not my handwriting.
 18 Q. -- on Exhibit 478?
 19 Whose is it?
 20 A. I can't be certain but I would assume it's
 21 Niru's. She's an engineer that works close with me.
 22 Q. Did she help in any way on the time impact
 23 graphic?
 24 A. No. Not on this DOS one, no.
 25 Q. And the next entry is owner time impact. And

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1 that's where we have the 332 calendar days on Exhibit 478.
 2 What's the --
 3 MR. HAHN: 476.
 4 MR. ANDERSON: Thank you.
 5 BY MR. ANDERSON:
 6 Q. And a moment ago I asked you how you
 7 calculated that and you said well, I'll give you the short
 8 answer but first I have to have my as-built schedule. And
 9 now we don't have the as-built schedule. So what's the
 10 answer?
 11 A. Here's the answer. The way that you come up
 12 with the amount of impact attributable to one party or
 13 another is to, when you have the schedule built in this
 14 fashion, which this is enough build for us to determine
 15 who's responsible for what. And we make a determination on
 16 these events what are owner-caused events.
 17 And my determination was that all the red
 18 events were owner-caused events. And so were the
 19 cross-hatched events. They were all owner-caused events.
 20 Q. So red equals the owner and cross-hatched as
 21 well?
 22 A. Cross-hatched does as well.
 23 Q. Well, what's the distinction between the two
 24 forms of the bars?
 25 A. Okay. When I built the schedule the red

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1 events were on the critical path. They were critical to
 2 the project.
 3 Q. Okay. And the cross-hatched are not?
 4 A. They were not critical to the project.
 5 Q. All right.
 6 A. It doesn't mean that on their own they would
 7 not have been critical. It means that the sum total of all
 8 of the events took them off the critical path because some
 9 of these are very long events.
 10 Q. Okay.
 11 A. Okay.
 12 Q. Now, how did you get to 332 then?
 13 A. Okay.
 14 Q. You distinguished between the two types of
 15 bars.
 16 A. What we would do is we would do one or two
 17 things. One, we might take the owner events -- the
 18 contractor events that he's responsible for, and have all
 19 those events go to a zero duration and see what time is
 20 left.
 21 In this case -- in this case we had determined
 22 that these owner changes were the cause of most of the
 23 delay so I had all the owner changes go to zero.
 24 Q. Okay.
 25 A. And when they go to zero it's -- the project

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1 -- it's called collapsing the project. The project
 2 collapses back to the time extension.
 3 Q. And by virtue of that fact you concluded that
 4 all of the time spent on the project after the extension
 5 date was owner caused?
 6 A. The overriding extra time on the project, yes.
 7 Q. And by overriding do you mean every minute?
 8 A. Every minute that this contributes to -- there
 9 could have been some concurrencies there, but the
 10 concurrency is taken out when we collapse the schedule.
 11 Q. But every minute of owner-caused delay goes
 12 into the -- strike that.
 13 The 332 days would be simply the time between
 14 the extended completion date and the end of the project?
 15 A. It's not that simple but that's the way it
 16 came out in this case.
 17 Q. All right. Are there any contractor-caused
 18 delays on this time impact graphic?
 19 A. No. Because the changes over rode all the
 20 original construction work on this project.
 21 Q. Where would we find the owner-caused delays
 22 I'm sorry, the contractor-caused delays?
 23 A. Well, there were none. I didn't find any.
 24 Q. Okay. And where did you look?
 25 A. I looked in the daily reports. I prepared,

35 (Pages 134 to 137)

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1 you know, the updates. I prepared this in final analysis.
 2 Q. When you say you prepared the updates, I
 3 thought the updates didn't have anything to do with
 4 responsibility?
 5 A. They don't have to do with responsibility but
 6 all that data comes together. You have to use all the data
 7 that you have.
 8 Q. Okay. And it would all come together in the
 9 as-built schedule?
 10 A. In the final analysis that's correct.
 11 Q. Okay. But we don't have that schedule.
 12 A. It doesn't appear to be here.
 13 Q. And so, as you sit here today, do you know if
 14 there were any contractor-caused delays on your final
 15 schedule, your as-built schedule?
 16 A. There were none that I found that delayed the
 17 project.
 18 Q. Okay. So there may have been some delays?
 19 A. There may have been; but they were not
 20 critical.
 21 Q. Okay. And obviously the definition of
 22 critical would be one that delayed the ultimate completion
 23 date?
 24 A. That's correct.
 25 Q. Do you have a list somewhere of how you

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1 what I basically do, is I would start inputting in data --
 2 inputting in activities into the schedule, connecting those
 3 within the computer, and determining the start and finish
 4 dates.
 5 Many times when we start with events like
 6 this, we might type in each event and put a note beside the
 7 event when we determine when the start/finish date was of
 8 that event. And then have the computer sort for the
 9 earliest events. And that's how we start connecting all
 10 the activities to make the road map for the project. We
 11 might do it a month at a time. We just keeping pushing it
 12 on until we're done at the end.
 13 We're not trying to -- we don't know what the
 14 end result is going to be when we start. We just take the
 15 data and we start looking at it like -- and we usually do
 16 it month at a time. And slowly we build out the project
 17 until we feel comfortable with what we've got, how we built
 18 the schedule.
 19 Q. Okay. Based on what we have here on the
 20 table -- I want to make sure I understand what you had
 21 beside you when you were building your as-built schedule.
 22 You had some daily reports from Mr. Blough, and from what
 23 we can tell, they only covered 2005.
 24 MR. HAHN: Object to the form.
 25 BY MR. ANDERSON:

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1 brought everything together? By list, I would expand that
 2 to some handwritten notes where you sat down and said okay
 3 I've got all this information, this is what I'm thinking?
 4 A. No. What I have -- everything in front of you
 5 is all the documents we found.
 6 Q. Okay. What we have in front of us are a
 7 number of reports on the project from Mr. Blough and some
 8 other information, but I don't see anything in writing that
 9 you prepared that would reflect your thought process on how
 10 various events on the project were attributed either to the
 11 owner or to the general contractor. Where do we find that?
 12 A. There probably would never be those because
 13 many times when I do an as-built schedule, I do it on a day
 14 by day basis and I just input the data into the computer as
 15 I go.
 16 Q. Tell me how that works. I see you in front of
 17 your computer. What do you have around you that you're
 18 using as the basis for whatever you're doing on the screen?
 19 A. It could be many documents but let's say it's
 20 just the daily reports.
 21 Q. Let's take this project. What do you remember
 22 using?
 23 A. I used the daily reports. I used scheduling
 24 data that I had, completion schedule data. I did talk to
 25 Barry Hayes on occasion to verify different events. But

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1 Q. Correct?
 2 A. That's all that's here. I did send some stuff
 3 back to SE/Z.
 4 Q. Okay. You would have had a transmittal for
 5 that, you wouldn't just send it blank, would you?
 6 A. I don't recall.
 7 Q. Well, what's your standard practice?
 8 A. We usually make a transmittal. But I don't
 9 recall if one was made. There have been times we've not
 10 made a transmittal.
 11 Q. Okay. What else, in terms of durations of
 12 certain events, did you have to build your final as-built
 13 schedule?
 14 A. On some of the events we would have used any
 15 scheduling data that we had that showed actual dates on the
 16 scheduling data.
 17 Q. Okay. You had Mr. Blough's chronological
 18 summaries of events; didn't you?
 19 A. We had some of that, yes.
 20 Q. Okay. Did you ever ask Mr. Blough if what he
 21 was telling you was contradicted or disputed by either the
 22 owner's representatives or the designer's representatives?
 23 A. No. We told him to give us the actual data
 24 that he had on the project.
 25 Q. I understand you told him, or asked him for

36 (Pages 138 to 141)

<p style="text-align: right;">Page 142</p> <p>1 his input; correct?</p> <p>2 A. Correct.</p> <p>3 Q. But when you asked him that did you say, by</p> <p>4 the way Curt, is this accepted by all parties? Is there</p> <p>5 any dispute that a particular event might have been caused</p> <p>6 by some other reason as opposed to what you're telling me?</p> <p>7 A. No. I was asking Curt to get me data for</p> <p>8 dates. He was giving me start dates, finish dates, for</p> <p>9 events.</p> <p>10 Q. Now start dates and end dates don't tell you</p> <p>11 who's responsible though, do they?</p> <p>12 A. No, they don't.</p> <p>13 Q. Where did you come up with the responsibility?</p> <p>14 A. Well, that would have been more review of the</p> <p>15 daily reports, the documents I looked at, discussions with</p> <p>16 the construction personnel.</p> <p>17 Q. Okay. What else? Anything else? Please take</p> <p>18 your time.</p> <p>19 A. Any correspondence I saw.</p> <p>20 Q. Okay. Have you found any correspondence</p> <p>21 provided to you by SE/Z or Hobson relative to the position</p> <p>22 taken on any of these events by the owner or the designers?</p> <p>23 A. I have not seen much owner or designer</p> <p>24 information; that's correct.</p> <p>25 Q. Do you feel that that is a gap in the</p>	<p style="text-align: right;">Page 144</p> <p>1 this case?</p> <p>2 A. I don't recall.</p> <p>3 Q. Did you review that before you prepared the</p> <p>4 REA?</p> <p>5 A. No. This was under work before the project</p> <p>6 was terminated. And SE/Z wanted me to continue with this.</p> <p>7 Q. Okay. But my question is a little bit broader</p> <p>8 than that. Did you ever review article 14 of the general</p> <p>9 conditions in terms of what was compensable if the owner</p> <p>10 terminated for convenience?</p> <p>11 A. I don't recall what article 14 is.</p> <p>12 Q. Article 14 deals with termination for either</p> <p>13 cause or convenience.</p> <p>14 A. Okay.</p> <p>15 Q. Did you -- do you recall ever looking at that</p> <p>16 in terms of what should go into the REA that you were</p> <p>17 preparing for SE/Z?</p> <p>18 A. No. I would never have considered that.</p> <p>19 Because what I was preparing was more of a delay claim</p> <p>20 aspect.</p> <p>21 Q. Okay. Delay claims that had already been in</p> <p>22 place during the pendency of the project?</p> <p>23 A. Correct.</p> <p>24 Q. Now, have you reviewed any of the orders from</p> <p>25 the judge that is hearing our particular case?</p>
<p style="text-align: right;">Page 143</p> <p>1 information you needed to prepare an accurate as-built</p> <p>2 schedule?</p> <p>3 MR. HAHN: Object to the form.</p> <p>4 THE WITNESS: No, not really. But, you know,</p> <p>5 the end result of this the project was terminated for</p> <p>6 convenience. So much of this probably doesn't matter,</p> <p>7 legally.</p> <p>8 Q. Why is that?</p> <p>9 A. Because a termination for convenience is a</p> <p>10 different animal.</p> <p>11 Q. In what way?</p> <p>12 A. Costs that are incurred up to the time of the</p> <p>13 termination are usually compensable.</p> <p>14 Q. Under what reading of the contract?</p> <p>15 A. I'm not a lawyer here, but I just recently got</p> <p>16 off a project just like that that was terminated for</p> <p>17 convenience. And we represented the owner and they</p> <p>18 recommended full payment to the contractor for every penny</p> <p>19 he spent on the project.</p> <p>20 Q. Okay. Have you told that to SE/Z?</p> <p>21 A. No. That project is -- that thing just ended</p> <p>22 not too long ago. I haven't spoken with SE/Z for quite a</p> <p>23 while.</p> <p>24 Q. What do you remember the contract referring to</p> <p>25 as compensable damages for a termination for convenience in</p>	<p style="text-align: right;">Page 145</p> <p>1 A. I've not seen anything on this case for two</p> <p>2 years.</p> <p>3 Q. Has anybody told you what the judge has</p> <p>4 determined are appropriate and inappropriate damages under</p> <p>5 the contract in this particular case?</p> <p>6 A. I really don't know what he determined or</p> <p>7 didn't determine. I've heard some things from Mr. Hahn,</p> <p>8 but that's all.</p> <p>9 Q. What has he told you? It's fair game.</p> <p>10 MR. HAHN: Sure. Go ahead.</p> <p>11 THE WITNESS: Well, he told me there's a -- he</p> <p>12 filed some motion to get some of the costs in. The judge</p> <p>13 says they're not allowed but I guess he's going to refile</p> <p>14 or something of that nature.</p> <p>15 BY MR. ANDERSON:</p> <p>16 Q. Okay. Is that the only motion that he's told</p> <p>17 you about?</p> <p>18 A. He's told me he's filed a couple of motions</p> <p>19 but that's, you know, I'm not doing the legal stuff here</p> <p>20 so...</p> <p>21 Q. Has he told you about any of the motions the</p> <p>22 owner or the design team filed?</p> <p>23 A. I don't recall.</p> <p>24 MR. HAHN: I told him about your win.</p> <p>25 BY MR. ANDERSON:</p>

37 (Pages 142 to 145)

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1 Q. He told you that there is a clause in the
2 contract entitled a mutual waiver of consequential damages?
3 A. I believe he mentioned something about that,
4 yes.
5 Q. And do you know what that means?
6 A. No. I'm not a lawyer, so . . .
7 Q. Well, you've been in the construction industry
8 for, I think you told me, 32 years. Since 1972; correct?
9 A. Correct.
10 Q. You've never heard of a mutual waiver of
11 consequential damages?
12 A. Well, I've heard of that but you're asking me
13 to make a comment on the contract --
14 Q. I'm asking you --
15 A. -- and I was never hired to do that.
16 Q. Well, you were hired to prepare a delay claim
17 and submit it on behalf of SE/Z; correct?
18 A. Correct.
19 Q. You wanted to make sure that that delay claim
20 comported with the terms of the contract; right?
21 A. Correct.
22 Q. You didn't want to submit something that
23 wasn't allowed by the contract, did you?
24 A. I believe everything we submitted would have
25 been allowable dollars.

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1 Q. And you determined that by a review of the
2 contract?
3 MR. HAHN: Object to the form.
4 THE WITNESS: We determined that by my
5 experience in the construction industry. This project had
6 one unique feature that allowed for extended costs, the
7 suspension. It was -- there's a definite suspension and
8 there's a release from the suspension. Many jobs that are
9 suspended do not have that. And I've still seen those
10 projects be granted extended home office costs. This one
11 has a definite documentation on that.
12 BY MR. ANDERSON:
13 Q. Okay. Are you aware of any delays to the
14 project caused by the contractor or Hobson?
15 A. None that are critical.
16 Q. And are you aware of any delays caused by
17 Hobson or SE/Z to this project?
18 A. I can't recall any.
19 MR. HAHN: I'm --
20 MR. ANDERSON: Yes, it was the same question
21 But I needed to get the answer.
22 MR. HAHN: I was just objecting to the form,
23 so . . .
24 BY MR. ANDERSON:
25 Q. Just so I'm clear, as you sit here today

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1 you've been paid approximately \$70,000?
2 A. Whatever it says. I'm still owed some money.
3 Q. How much?
4 A. I don't know for sure but I think it's around
5 \$8,000.
6 Q. You billed 70, roughly. If we go to Exhibit
7 448, it looks like \$70,674 would be for consultant fees. I
8 don't know if that's only you, it might be somebody else as
9 well. But roughly in that range.
10 That's a fair amount of work; isn't it?
11 A. Correct.
12 Q. And based on that amount of work, is it your
13 testimony today that you are not aware of any delays to the
14 project, critical or not, caused by Hobson or SE/Z?
15 A. Not as we sit here today. I can't recall.
16 It's been two years, I can't recall.
17 Q. Well, you remembered what the welds looked
18 like.
19 A. Yeah.
20 Q. Is that something --
21 A. I can specifically visually remember that,
22 yes.
23 Q. Well, do you think maybe the wrong kind of
24 material would be something that would stick out in your
25 mind if Hobson used the wrong materials?

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1 A. No.
2 Q. Are you aware that Hobson used the wrong
3 material for the ductwork?
4 A. I didn't analyze that. I was just looking at
5 the time impact of things.
6 MR. ANDERSON: Please read back my question.
7 (Question read back.)
8 THE WITNESS: Has that been proven, or is that
9 just your question to me?
10 BY MR. ANDERSON:
11 Q. I get to ask the questions right now.
12 A. I understand there's going to be another
13 expert testify on that. And I'm not an expert in metal,
14 so . . .
15 Q. What do you understand that other expert is
16 going to say?
17 A. I don't know. I've never talked to the other
18 expert.
19 Q. Well, what do you understand he's going to
20 say? You tell me "I understand another expert is going to
21 testify on that".
22 A. That's all I know. I understand that Hobson
23 has other experts.
24 Q. To testify about whether or not they used the
25 right material?

38 (Pages 146 to 149)

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1 A. I'm not sure. I just know they have several
2 experts.
3 Q. And you're the delay expert.
4 A. Correct.
5 Q. And as the delay expert, is it your testimony
6 today, in our one opportunity to ask you questions about
7 your trial testimony, that you are not aware that Hobson
8 used improper material to construct the ductwork?
9 A. When I prepared my analysis I did not grant
10 any of the delay to Hobson for that issue.
11 Q. Were you aware of it; that's all I'm asking?
12 A. I've never -- no, I don't recall hearing that
13 before.
14 Q. Let's get a little deeper. Were you aware
15 that Hobson used 304 stainless steel as opposed to 316L as
16 required by the contract and had to tear it all out and
17 refabricate --
18 MR. HAHN: Object to form.
19 BY MR. ANDERSON:
20 Q. -- the ductwork?
21 A. I can't recall that.
22 Q. Okay.
23 MR. HAHN: Suitable time for a break? We've
24 been at it for almost two hours.
25 MR. ANDERSON: Well, we took a break. Hold

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1 on.
2 MR. HAHN: There's no question pending,
3 so I'm not going to be here.
4 MR. ANDERSON: Okay.
5 (Brief recess.)
6 BY MR. ANDERSON:
7 Q. Let's -- we've taken a break; anything you
8 need to change in terms of an answer?
9 A. No.
10 Q. Let's just take Exhibit 476. And I'd like you
11 to just help me. How do we read this? What are you trying
12 to portray to somebody who's reading this for the first
13 time?
14 And let's just start with the first entry, it
15 says contract work, September 3, '03, to November 20, '03.
16 What does that mean?
17 A. That means there was a series of normal
18 contract work and concurrent with that was change work.
19 Q. Okay. Concurrent with that was change work.
20 What are you referring to in that last sentence?
21 A. Well, it's the second item is concurrent with
22 that. The second and third items.
23 Q. Okay. Now the second item is CIC 74, shower
24 doors. And the heading is notified A/E, architect and
25 engineer; right?

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1 A. Right.
2 Q. And this says September 3, 2003, through
3 November 13, 2003. So that's a duration of 71 days.
4 What do you mean by notified A/E? Did it take
5 that long to notify the architect and engineer?
6 A. It took that long, probably, to get an answer
7 back, a response.
8 Q. So this would be the start period of when the
9 architect was notified, and the end period when the
10 architect responded?
11 A. Yes.
12 Q. Okay. And you call that a delay?
13 A. Yes. It's one of the events on the project.
14 Q. Okay. I know it's one of the events, but why
15 is it coded as a critical path delay in red?
16 A. I can't really recall right now, but it's all
17 tied into another CCD number 12. Right now I just can't
18 really recall as I sit here.
19 Q. Okay.
20 A. It's been too long.
21 Q. Now, how do you have a critical path delay for
22 the shower door -- I'm sorry, is it shower doors for the
23 critical path delay; the second item?
24 A. Yes.
25 Q. How do you have a critical path delay for the

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1 same period that you have contract work ongoing? I thought
2 critical path meant nothing else could happen?
3 A. No. Critical path means it's the longest
4 chain of events.
5 Q. Okay. But you have work ongoing at the same
6 time; right?
7 A. That's correct.
8 Q. So, you've got work going on but a critical
9 path delay concurrently?
10 A. That can happen, yes.
11 Q. Well, it did happen on your chart, didn't it?
12 A. Yes.
13 Q. And if it's concurrent, that means that
14 there's no delay attributable to the owner; right?
15 A. The overriding -- the overriding critical part
16 of this is the change, not the contract work.
17 Q. Tell me what that means in terms of delay to
18 the project if you attribute it to the owner.
19 A. Well -- and I can't recall exactly what the
20 sum total of all this was -- but it's possible when I did
21 this that some of these concurrent events were
22 noncompensable. But overriding there was 332 days of
23 compensable time.
24 Q. Would that be one of your judgement calls?
25 A. No. That would be what I found by reviewing

39 (Pages 150 to 153)

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1 all the information.
 2 MR. HAHN: Object to the form.
 3 BY MR. ANDERSON:
 4 Q. Well, how do we know how you did it? You're
 5 not sure how you did it; how do we know?
 6 A. It's been two years ago. I can't recall
 7 exactly why that event's in there.
 8 Q. Where do you go to find out?
 9 A. I'd have to review my information.
 10 Q. What information? Because --
 11 A. I'd have to go back and look at my computer
 12 files and just look at things and just get refreshed what I
 13 had.
 14 Q. What do you have in your computer files?
 15 A. The same thing that was sent to you.
 16 Q. All right.
 17 MR. ANDERSON: Mike, go get that disk. Do we
 18 have a -- let's go off the record.
 19 (Discussion off the record.)
 20 BY MR. ANDERSON:
 21 Q. Did you look at that computer data before
 22 coming out here for this deposition?
 23 A. No.
 24 Q. A moment ago, not a moment ago but a fair
 25 amount ago, you said that it couldn't be read unless you

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1 had the Primavera software; is that correct?
 2 A. That's absolutely correct.
 3 Q. Okay. Actually I think counsel said it.
 4 A. You can't read Primavera data unless you have
 5 the software.
 6 MR. HAHN: I think I said I don't have it.
 7 BY MR. ANDERSON:
 8 Q. Is there even an index on there in terms of
 9 what was -- what it contained?
 10 A. You wouldn't be able to read it. It's
 11 different. It's a different format, it's not a doc, it's a
 12 different format. You just can't read it.
 13 Q. Okay. So in order to tell us if this first
 14 red bar, which you have coded as, what, critical path
 15 delay?
 16 A. Critical activity.
 17 Q. Critical activity, falls into the 332 days,
 18 what would you have to look at?
 19 A. I'd have to look at my -- basically I'd start
 20 with my computer work. I'd have to go relook at that.
 21 If you would have deposed me when I made this,
 22 I could have answered every one of your questions. But you
 23 didn't depose me then.
 24 Q. Well, when did you make this?
 25 A. I made this in -- I would have made this in,

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1 what, July; July of '05.
 2 Q. Nobody had filed a lawsuit yet.
 3 A. I understand.
 4 Q. The next time you do one of these call me.
 5 I'll be sure and come over. All right.
 6 So, if I'm understanding the way this is all
 7 laid out, there's contract work going on through November
 8 20th, there a concurrent critical path delay --
 9 A. Correct.
 10 Q. -- and are you saying that there's no more
 11 contract work after November 20th until December 11?
 12 A. There was --
 13 Q. December 14, sorry.
 14 A. There was -- from what I can recall, there was
 15 not enough significant contract work going on to warrant
 16 that. Most of it is change work, from what I recall. But
 17 I can't be certain of that because it's been too long for
 18 me.
 19 Q. Okay. So that would be another judgement call
 20 that you made in terms of not showing it on this impact
 21 graphic?
 22 MR. HAHN: Object to the form.
 23 THE WITNESS: I guess. It's been two years; I
 24 can't recall.
 25 BY MR. ANDERSON:

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1 Q. As you sit here today you don't know why you
 2 picked the project backup in terms of contract work on
 3 December the 14th?
 4 A. No. As we sit here today I can't definitely
 5 tell you why I did that.
 6 Q. If somebody looked at that, would you have to
 7 conclude that there was no work from November 14 --
 8 November the 20th until December 14?
 9 MR. HAHN: Object to the form.
 10 THE WITNESS: No, that's not correct.
 11 BY MR. ANDERSON:
 12 Q. Okay. So there's work going on on the
 13 contract, or ongoing under the contract, that just doesn't
 14 show on your impact graphic?
 15 A. No. What it would show me is there's work
 16 going on on this project but it's change work.
 17 Q. What is it? What change work was it?
 18 A. It's -- it appears it's CCI number 4, CCI 74,
 19 CIC 104, CIC 39, CIC 4, CIC 5, CIC 121, and CIC 39.
 20 And in fact, those three days were issues of
 21 time extension. Oh yeah, and CIC 4 was issued as a time --
 22 14 days issued as a time extension.
 23 So the time of any contract work, if there was
 24 any in there, was encompassed by two time extensions that
 25 were granted. So it's a moot point. I mean, there was a

40 (Pages 154 to 157)

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1 time extension granted for additional work during that time
2 frame.
3 Q. I see a three-day -- I see there's a 14-day
4 for CIC 4.
5 A. Right.
6 Q. And you've got it coded as blue. What does
7 blue mean?
8 A. Blue means it's a granted time extension.
9 That's for that work.
10 Q. All right.
11 A. And there's 14 days for CIC 4.
12 Q. Okay. And then you have another three days
13 for CIC 39.
14 A. Correct.
15 Q. As you sit here right now you don't know what
16 those were?
17 A. What the what was?
18 Q. Which events those CICs referred to.
19 A. Not as we sit here. They're in some list
20 someplace but you can see the time from -- I could just as
21 easily have had a green bar in here parallel to these two
22 blue bars because it's the same difference. The time
23 extension was granted so we would not have taken that time
24 out in any of our analysis. It's just addition time in the
25 project. It encompasses that time.

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1 Q. Let's take the fifth entry down; CIC 74 again,
2 shower doors.
3 A. Uh-huh.
4 Q. What was the critical path delay involving the
5 shower doors? How did they hold up the project?
6 A. I don't recall right now as we sit here. I
7 can't tell.
8 Q. Who told you that?
9 A. I can't recall.
10 Q. Okay. Let's keep going down to the next large
11 red bar, CIC 121, stainless steel ductwork. Do you see
12 that?
13 A. Yes.
14 Q. December 11 through February 11, what's that,
15 63 days? I can't read it on mine, sorry. 63 days?
16 Right here, CIC 121. You attributed 63 days
17 to that particular delay, right?
18 A. To that portion, yes.
19 Q. Okay. And then there's a longer cross-hatch
20 delay through October if you go down further. CIC 121, do
21 you see that?
22 A. 121 -- yes.
23 Q. Okay. Now, do you know which change order
24 that would have been?
25 A. I don't recall what that number refers to in

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1 the actual work. As we sit here I do not recall.
2 Q. Okay. If it refers to change order 12 --
3 well, you have a list that compares CICs to change orders,
4 don't you. I think we looked at it. Why don't we find
5 that.
6 Off the record, please.
7 (Discussion off the record.)
8 BY MR. ANDERSON:
9 Q. I've handed you a copy of what we marked
10 earlier as Exhibit 409 to the series of deposition we've
11 taken in the case.
12 This is dated June 9, 2005. It looks like
13 it's based on a spreadsheet dated May 16, 2005, from Barry
14 Hayes.
15 Do you know where that spreadsheet is?
16 A. No, unless it's in here. I mean, if it's
17 Barry Hayes it should be at SE/Z.
18 Q. I don't disagree. Have you seen it today in
19 the materials that we've gone through?
20 A. I don't believe I've seen it today.
21 Q. Okay. Let's just look at 409 then in relation
22 to the question I asked you earlier about your time impact
23 graphic, Exhibit 476.
24 If you look at CIC 121 on the bottom of the
25 first page. Do you see that?

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1 A. Yes.
2 Q. And then it looks like it goes on to the next
3 page. What is all this under CIC 121? What do all these
4 mean, all these entries?
5 A. Some kind of construction activity.
6 Q. Okay.
7 A. 1D, so.
8 Q. Is this something you would have prepared,
9 this Exhibit 409?
10 A. I believe so, yes.
11 Q. All right. And off to the side of CIC 121
12 there's a reference to change order 12; do you see that?
13 A. Yes, I do see that.
14 Q. Okay. Now -- and attributable to CIC 121, or
15 change order 12, there's a number of days of delay that you
16 decided were the responsibility of the owner; correct?
17 A. I can't say that without doing -- without
18 recollapsing the schedule what goes with what. Because
19 when you collapse some of these events some of the owner --
20 some of the construction actual time becomes concurrent.
21 And so the events don't collapse anymore. They don't
22 actually drive the project out even though they're shown as
23 the critical path.
24 Q. Okay. Can you determine which ones don't
25 collapse?

41 (Pages 158 to 161)

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1 A. Not as we sit here, no, I can't.
 2 Q. Would it be accurate to state that if you took
 3 the days of the delay out of the project that you attribute
 4 to CIC 112, it would be less than the 332 calendar days you
 5 came up with?
 6 A. I don't know. I've not done that. I mean,
 7 I've not done that.
 8 Q. Have you been informed of the court's rulings
 9 with respect to change orders 10, 12, and 15?
 10 A. No.
 11 Q. In those rulings the court determined that any
 12 time attributable or claimed or related to the topics of
 13 those three change orders, had been resolved and were no
 14 longer a part of the case.
 15 MR. HAHN: I'm going to object to the form.
 16 BY MR. ANDERSON:
 17 Q. And no one's told you that?
 18 A. This is the first I've heard that.
 19 Q. No one's asked you to go back and recalculate
 20 your time graph, your time impact graphic, or your
 21 conclusions in this case based on the rulings of the court?
 22 A. No one's asked me to go back and relook at any
 23 of my information.
 24 Q. Are there any activities on this chart,
 25 Exhibit 476, that are administrative in nature?

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1 MR. HAHN: Object to the form.
 2 THE WITNESS: I don't really think so.
 3 BY MR. ANDERSON:
 4 Q. Now, how does your chart, or time impact
 5 graphic, Exhibit 476, take into account that change order
 6 12 granted 20 calendar days?
 7 A. That would have been -- it looks like activity
 8 -- it's CIC 121. It looks like about a third of the way
 9 down on the chart.
 10 Q. Okay. So how does that work in terms of how
 11 the progress of the project was impeded in any way?
 12 A. Well, it's 20 additional days of work to the
 13 contract. If it's an extension to the contract, it's as if
 14 it is contract time. So you know, it could have been a
 15 green bar as opposed to a blue bar.
 16 Q. Okay. And you've attributed for each of the
 17 41 days on your chart?
 18 A. I believe so, yes.
 19 Q. Okay. Let's go down to your entry CIC 1 --
 20 let me see it.
 21 Let's take the hot gas bypass impacting, CIC
 22 4. You've got a -- looks like a 24-day duration on that.
 23 Do you recall what that was about?
 24 A. Not as we sit here, no.
 25 Q. Okay. Then there's a CIC 159, Coffman's field

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1 report. Cover CLGS lab. What's a CLGS lab?
 2 A. As we sit here I really don't know.
 3 Q. Okay. Punch work, five or six from the bottom
 4 you've got a 30-day duration. Was that a red line or how
 5 can you tell?
 6 A. It's contract punch work.
 7 Q. Okay. And you have test and balance issues.
 8 You've got 30 days and it looks like the end of January
 9 through the 1st of March. And then another 94 days between
 10 March 2 and June 3, 2005.
 11 How did you attribute those to critical
 12 delays, critical path delays?
 13 A. The test and balance issues?
 14 Q. Yes.
 15 A. I can't be definite on what I recall, but this
 16 project could never be test and balanced. That was the
 17 problem.
 18 Q. Who told you that?
 19 A. I remember seeing the daily reports. They
 20 could never get it finished.
 21 Q. Mr. Blough?
 22 A. And my understanding is there was something to
 23 do with -- something to do with a missing damper in the
 24 pipe system. There should have been an extra damper to
 25 make it seal off the structure. Something about that.

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1 Q. All right. Do you recall receiving any
 2 information as to whether or not the contractor had
 3 properly constructed the laboratory to specs at the time
 4 that the testing and balancing was attempted?
 5 MR. HAHN: Object. Can you read that back?
 6 (Question read back.)
 7 MR. HAHN: Okay.
 8 THE WITNESS: No. I think that's why we're
 9 here. I think that's the major dispute.
 10 BY MR. ANDERSON:
 11 Q. But my question is, did you receive any
 12 information regarding whether or not the laboratory was
 13 constructed to specifications?
 14 A. All indications I received from SE/Z was that
 15 it was constructed correctly.
 16 Q. Did they tell you that the undercut of the
 17 doors was appropriate?
 18 MR. HAHN: Object to the form.
 19 MR. ANDERSON: What basis?
 20 MR. HAHN: Are you representing that to him?
 21 MR. ANDERSON: Did they tell you --
 22 MR. HAHN: Are you representing it was to spec
 23 or not to spec?
 24 BY MR. ANDERSON:
 25 Q. Listen to the question.

42 (Pages 162 to 165)

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1 Did SE/Z tell you that they had properly
2 constructed the size of the undercut of each door?
3 A. I don't recall hearing anything about the
4 undercut of the doors.
5 Q. Did SE/Z or Hobson indicate to you that the
6 sash height of -- do you know what a BSC is?
7 A. Not while we're sitting here.
8 Q. A biosafety cabinet.
9 A. Okay.
10 Q. That the sash height of the biosafety cabinets
11 had been properly set during the period the testing and
12 balance was underway?
13 A. No, I don't recall hearing that.
14 Q. Would these be pieces of information that you
15 would have liked to have known when you were making your
16 judgment calls as to who was responsible for various
17 delays?
18 MR. HAHN: Object to the form.
19 THE WITNESS: No, I don't believe so.
20 BY MR. ANDERSON:
21 Q. Okay. Why not?
22 A. I don't believe they would have influenced me.
23 There were several things on this project, you know, that
24 changed. They lowered the ceiling height, made some of the
25 constructability very difficult. I was in there when they

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1 were showing me the dimension they had to build things with
2 the new ceiling height and they couldn't -- some of the
3 stuff wouldn't fit inside there. I remember that because
4 it was all open when I was there.
5 The thing I have learned -- I learned this
6 yesterday and it shocked me -- that this whole facility was
7 torn out and rebuilt. I just -- I'm just shocked.
8 Q. Why?
9 A. I can't believe it would have had to have been
10 totally taken out and rebuilt. That had to be a tremendous
11 cost to somebody. I'm just kind of shocked. One of those
12 things that just kind of shocked me.
13 Q. And tell me the basis of your shock. Tell me
14 why are you saying this?
15 A. Well, it shocked me that it would have to be
16 totally taken out. I've not seen many projects where they
17 -- even if it's a design error or constructability error --
18 where something is totally stripped out and start over. I
19 mean, I've just not seen that. Usually there's repairs
20 done that are less -- you know, more cost effective.
21 Q. Okay. What else have you learned about the
22 project in the last couple days? Anything else?
23 A. No. Just that it was taken out and rebuilt at
24 a high cost.
25 Q. You've told us that you weren't told about the

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1 judge's orders with respect to three change orders.
2 Were you told about the judge's order
3 regarding consequential damages being waived?
4 A. I don't recall specifically, but I think I
5 already answered that. Mr. Hahn and I had some kind of
6 conversation about some motions just in passing.
7 Q. Do you understand that a waiver of
8 consequential damages under this contract means that you
9 cannot seek home office overhead?
10 A. I did briefly look at 14, and it does have
11 some wording to that. But that seems to be a legal
12 question.
13 Q. Okay. But legal determinations sometimes
14 shape the way you get to form your delay analysis; right?
15 A. Let me just state it this way. It just seems
16 that from my experience, if there is a suspension on a
17 project, and that's what extended home office overhead is
18 all about, to cover the suspension period. Does an owner
19 have a right to suspend a project and get away with not
20 paying any damages for that suspension if it's -- does he
21 have a right to do that. I don't believe anyone does have
22 a right to do that.
23 Q. I guess one way we could determine if that
24 right has been granted would be to look at the contract;
25 would you agree with that?

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1 A. And ultimately the judge's final ruling.
2 Q. And assuming that the judge has ruled that the
3 contract language states that there was a mutual waiver of
4 consequential damages, which include home office overhead,
5 that would not be an appropriate part of any delay claim in
6 this case; would it?
7 A. Well, I can't answer that because I'm not the
8 attorney. But I've also been on cases when there's been a
9 clause for no damage for delay, and the delay damages have
10 been granted. I've seen those before.
11 Q. Okay.
12 A. So just because it says in the contract,
13 doesn't mean it going to stand based on the facts.
14 Q. Okay. So you'd leave it in your delay claim
15 no matter what the judge says?
16 MR. HAHN: Object to the form.
17 THE WITNESS: Yes. It's up to the trier of
18 fact to say it's not -- they can't be compensated for that.
19 BY MR. ANDERSON:
20 Q. Okay. Now, we did make some copies of -- is
21 this the original?
22 A. Yeah.
23 Q. Let's give you that back. Did we make five?
24 Okay.
25 (Exhibit No. 479 marked.)

43 (Pages 166 to 169)

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1 BY MR. ANDERSON:
2 Q. Exhibit 479 is a series of documents entitled
3 change -- contract change order listing. Is this something
4 you prepared, or had prepared under your supervision?
5 A. Yes. It would have been prepared in our
6 office.
7 Q. Okay. Now, on it there are a number of little
8 handwritten notations. Would that be just a cross
9 reference CICs to various PRs and RFIs?
10 A. I don't have anything with handwritten notes
11 on it.
12 MR. HAHN: Can we get rid of three copies
13 of...
14 MR. ANDERSON: I think so.
15 THE WITNESS: Do you want to take that back?
16 MR. ANDERSON: You're looking at -- what the
17 heck.
18 Let's take a break.
19 (Brief recess.)
20 BY MR. ANDERSON:
21 Q. All right. Let's go back to Exhibit 476.
22 I've kind of gone through it selecting different items to
23 talk to you about. What I would like to ask is, can you
24 explain to me how any particular entry on this chart
25 results in 332 days of contract delay that you have come up

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1 A. Yes.
2 Q. All right. The third, page, the first full
3 page of copy says that you may testify -- and I'll quote --
4 that the amounts set forth in SE/Z's request for equitable
5 adjustment previously submitted to the State of Idaho, and
6 the damage summary attached in SE/Z's mediation statement,
7 constitute the amount of payment for SE/Z's work executed
8 on the project and proven loss with respect to materials,
9 equipment, tools, and construction equipment and machinery,
10 including reasonable overhead and profit.
11 It says the basis for your opinions are set
12 forth in the REA, the referenced CIC files, your review of
13 the construction documents and records of the project, and
14 SE/Z's -- it says reviewed financial statements but I don't
15 know what that means, do you; reviewed financial
16 statements?
17 A. I would assume it means reviewed by someone
18 else, accountant reviewed.
19 Q. Okay. So are you prepared to testify
20 regarding the damages for SE/Z set forth in the REA?
21 A. For SE/Z, yes.
22 Q. Okay. Now just turn to -- turn to -- probably
23 grab Exhibit 412.
24 All right. 412 is a -- I have a copy -- let's
25 take that book away.

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1 with?
2 A. The answer is no, to that question.
3 Q. And why not?
4 MR. HAHN: One second, I've got to take this.
5 MR. ANDERSON: Oh, I'm sorry.
6 (Brief recess.)
7 (Last question and answer read back.)
8 THE WITNESS: Because there was no single one
9 event that you could ever -- in this case you could ever
10 answer that to. It's a series of events.
11 BY MR. ANDERSON:
12 Q. Okay. Can you tell me how the series of
13 events results in 332 days of contract delay?
14 A. Not as we sit here right now, no.
15 Q. Okay. Why not?
16 A. Because I'd have to have my computer and go
17 through -- I'd have to back into the analysis that's on
18 this chart.
19 Q. All right. And you can't do that as you sit
20 here right now?
21 A. Cannot do it as we sit here.
22 Q. All right. Let's go to -- let's go to Exhibit
23 448 again. That would be the supplemental expert
24 disclosure.
25 Got it?

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1 I have copied the portion of the materials
2 submitted to the State entitled request for equitable
3 judgment -- request for equitable adjustment, which
4 includes various reports and damages that I understand you
5 put together; is that correct?
6 A. Yes.
7 Q. Okay. Let's just to make the record -- maybe
8 we ought to --
9 MR. HAHN: There's no writing in it but it's
10 identical.
11 MR. ANDERSON: Let's do this. Let's mark
12 that first.
13 (Exhibit No. 480 marked.)
14 BY MR. ANDERSON:
15 Q. Exhibit 480 is the cover sheet for the REA; is
16 that correct?
17 A. Correct.
18 Q. With your letter?
19 A. Correct.
20 MR. ANDERSON: Is there a difference?
21 Mr. Hahn: His has his name on it.
22 BY MR. ANDERSON:
23 Q. All right. If you turn to that letter, is
24 this an accurate statement of what you were asked to do by
25 SE/Z; perform a time and monetary analysis of the problems

44 (Pages 170 to 173)

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1 that arose at the lab?
 2 A. Ultimately, yes, that's what I was asked to
 3 do.
 4 Q. Okay. And in this letter you again reiterate
 5 the 332 calendar days of project delay that we saw on the
 6 Exhibit marked 478.
 7 A. Yes.
 8 Q. Okay. And did you prepare the executive
 9 summary that was also contained in the REA?
 10 MR. ANDERSON: Let's mark this.
 11 (Exhibit No. 481 marked.)
 12 THE WITNESS: Yes, I would have put this
 13 together.
 14 BY MR. ANDERSON:
 15 Q. Do you recall the process by which you, for
 16 instance, selected the various critical project delays that
 17 you listed on the first and second page?
 18 A. No. It would have been a scheduling task, I'm
 19 sure, that would have determined what was critical.
 20 Q. Did you actually prepare the summaries for
 21 each of the issues that follow on the succeeding pages?
 22 A. The summaries I summarized out of other
 23 documents.
 24 Q. And the other documents would have been
 25 materials from Hobson?

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1 A. If it's a Hobson issue, yes.
 2 Q. Okay. All right. And then after the
 3 executive summary comes a chronology of disruptive events.
 4 Let's mark that as Exhibit 482.
 5 (Exhibit No. 482 marked.)
 6 BY MR. ANDERSON:
 7 Q. Who put this together?
 8 A. I would have put this together.
 9 Q. It looks like it was dated September 1, 2005,
 10 up in the upper left-hand corner. Do you see that?
 11 A. Yes.
 12 Q. It's also the date of the -- I'm sorry, the
 13 REA?
 14 A. Yes.
 15 Q. So would this have been prepared close in time
 16 to the REA?
 17 A. Maybe. It might just have been printed this
 18 date and, you know, put that date on it as the document
 19 date.
 20 Q. When you say these various CICs have these
 21 durations, do you know if these particular durations, and
 22 start and finish times, coincide with your time graphic or
 23 critical -- I'm sorry, time impact graphic?
 24 A. I can't be certain unless we compare.
 25 Q. All right. They should, shouldn't they?

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1 A. I would suspect they should.
 2 Q. Is this a function of your DOS Primavera
 3 program where you can just list off any events that have
 4 some sort of duration?
 5 A. No.
 6 Q. Why did you put this together?
 7 A. Just as a reference tool, if we needed it.
 8 Q. Okay. And then finally after we go through
 9 those, we'll call them preliminary matters, it looks like
 10 we have an overall claim sheet which is Exhibit 413 to the
 11 depositions. Do you see that?
 12 A. Yes.
 13 Q. And in this particular case you had the SE/Z
 14 amount of \$302,941, which was reflected in Exhibit 415.
 15 A. Yes.
 16 Q. And you put that chart together, Exhibit 415?
 17 A. Yes, I would have put this chart together.
 18 Q. Let's turn to Exhibit 415, if we could. The
 19 first entry involves home office overhead expenses for
 20 \$25,000; do you see that?
 21 A. Yes.
 22 Q. Then there's an attachment that follows?
 23 A. Correct.
 24 Q. Along with various references to Exhibit
 25 numbers and then the exhibits that follow?

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1 A. Correct.
 2 Q. Have you seen the exhibits that follow at any
 3 time referenced?
 4 There's a burgundy notebook that was provided.
 5 Does it appear that the -- from the burgundy notebook do
 6 you find the various exhibits that are contained in Exhibit
 7 415?
 8 A. It appears to be, yes.
 9 Q. Who provided you the burgundy notebook?
 10 A. SE/Z.
 11 Q. Okay. The home office overhead expenses, you
 12 just calculated that yourself using the information they
 13 provided you in terms of overall billings versus billings
 14 for this project and the other components of the Eichleay
 15 formula?
 16 A. I told them what information I needed and what
 17 periods of time. And they provided the dollar amounts to
 18 me for those periods.
 19 Q. And then you made the calculation?
 20 A. Yes, I did the Eichleay.
 21 Q. Okay. Would you consider home office overhead
 22 expenses -- strike that.
 23 Let me just have you read something. I'll
 24 have you look at Exhibit 4 to the depositions, and
 25 paragraph 4.3.10. It's called claim for consequential

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1 damages up at the top of the page; do you see that?
 2 A. Yes, I see this.
 3 Q. Does that appear to exclude from this contract
 4 home office overhead expenses --
 5 MR. HAHN: Object to the form.
 6 BY MR. ANDERSON:
 7 Q. -- based on your construction experience?
 8 A. A reading of this does appear to exclude home
 9 office overhead.
 10 Q. Okay. Now, the second entry on Exhibit 415,
 11 the list of SE/Z's damages in the REA, refers to actual
 12 field overhead expenses of \$19,249.24 between May 1, 2004,
 13 and July 31, 2004; do you see that?
 14 A. Correct.
 15 Q. Do you know why that particular time frame was
 16 selected?
 17 A. I can't recall right now why it was selected,
 18 but I know some of it came up to how SE/Z accounts for
 19 their information. I think they were on an even monthly
 20 basis. They couldn't break things out, you know, periods
 21 of time. So something like that.
 22 Q. Okay. Now the contract was extended,
 23 according to your chart, through July 6, 2004; correct, if
 24 you look at 476?
 25 A. That's correct.

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1 Q. Is there a reason why field overhead expenses
 2 during the contract period would be included in your damage
 3 calculation?
 4 A. I don't recall as we sit here. And I really
 5 don't know if they've included costs for that entire period
 6 or if that's just a notation that that's what it refers to.
 7 Q. Well, you're the one preparing this, correct?
 8 A. I understand that.
 9 Q. No one else prepared it, did they?
 10 A. No.
 11 Q. So you're the guy that I -- you're the only
 12 one I know to ask why this would be included. You're the
 13 one -- in other words, you're the one telling SE/Z what
 14 they can claim; right?
 15 A. Correct.
 16 Q. So why did you tell SE/Z that they could
 17 collect between May 1, 2004, and July 31, 2004, when the
 18 contract was extended to cover almost that full period?
 19 A. I don't recall.
 20 Q. Okay. Let's go to the next one. Actual field
 21 overhead expenses, August 1, '04, through December 31, '04.
 22 Again, this has base contract 149-100. Do you know what
 23 that contract was?
 24 A. Is that the contract -- that's either the
 25 state's number or SE/Z's number.

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1 Q. Okay. And it says \$35,587.11. Do you see
 2 that?
 3 A. Yes.
 4 Q. And if you go to -- there's some page numbers
 5 at the end there; HOB 17-000021, do you see that?
 6 A. Yes.
 7 Q. And down at the bottom you have that same
 8 number \$35,587.11.
 9 A. Yes.
 10 Q. And to the side of that it looks like Exhibit
 11 7 and 8 are support for it.
 12 A. Okay.
 13 Q. And if we go to the back it looks like Exhibit
 14 7 and 8, if you can actually read the little handwritten
 15 Roman numerals, purport to be the -- well, paragraph --
 16 Exhibit 7 is SE/Z 018864, as I read it. Do you see that?
 17 A. Yes.
 18 Q. Now, I couldn't find, during the deposition of
 19 Mr. Zambarano, how you could support this particular entry
 20 of \$35,587.11 off of Exhibit 7 as the document purports to
 21 represent.
 22 I think just to be fair and shorten this
 23 because we don't have much time left, in the mediation
 24 statement, which we marked as 449, that number appears. I
 25 says based on Exhibit 2. And if we go to Exhibit 2, we get

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1 \$35,587.11.
 2 These aren't Bate's stamped, I apologize.
 3 MR. HAHN: I think the copy actually lists --
 4 the exhibit in the deposition cuts off part of your Roman
 5 numeral.
 6 MR. ANDERSON: Down here?
 7 MR. HAHN: On the side.
 8 MR. ANDERSON: No these -- off the record.
 9 (Discussion off the record.)
 10 BY MR. ANDERSON:
 11 Q. When I referenced Exhibit 2, I'm referring to
 12 the first page of Exhibit 449, the third entry --
 13 A. Uh-huh.
 14 Q. -- of \$35,587.
 15 A. Correct.
 16 Q. And then behind it there were various exhibits
 17 with tabs in between them. We have not copied the tabs
 18 because they wouldn't copy on an 8 and a half by 11 anyway.
 19 So do you see where I'm finding \$35,587?
 20 A. Yes, I saw that on here.
 21 Q. Okay. And have you seen these backup pages
 22 before?
 23 A. No. This is the first time I've seen anything
 24 from the mediation.
 25 Q. Okay. So when the expert disclosure says

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1 you're going to testify, or may testify I guess it says in
2 actuality, to the damage claim presented in the mediation
3 statement, that's not entirely accurate, is it, since
4 you've never seen them before in terms of backup?

5 A. I've never seen the backup, no.

6 Q. Okay. And you'd be uncomfortable testifying
7 in that fashion without having a chance to fully explore
8 and understand what the backup says and means?

9 A. I'd want to look at this, yes.

10 Q. Okay. All right. Again, we're running short
11 of time so I'm going to kind of race through some of this
12 stuff.

13 The next entry is actual field overhead,
14 January 1, '05, through June 30, '05. Again, that's a
15 period of delay that you believe exists on the project;
16 right?

17 A. Correct.

18 Q. Then the entry is \$37,515. Do you see that?

19 A. Yes.

20 Q. And if you go to the back here it -- there is
21 a reference on HOB 17-000022 to that \$37,515.

22 A. You lost me. I can't find --

23 Q. It's the --

24 A. What's the SE/Z stand for?

25 Q. -- the fourth page in. It should be this

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1 page. Do you see that? That will do. That one there.

2 A. This one?

3 Q. I think so.

4 A. This shows bio lab delays.

5 Q. That one.

6 A. Okay.

7 Q. See that?

8 A. I see that.

9 Q. All right. Do you have that page in front of
10 you?

11 A. Yes, I do.

12 Q. All right. Now, there are no exhibits that
13 purport to support that document, or that figure of
14 \$37,515; correct?

15 A. I don't recall as we sit there.

16 Q. Well, there's no exhibit number out to the
17 side like there is on the preceding page. Do you see that?

18 A. No, there's not an exhibit number.

19 Q. Okay. So let's go to the mediation statement
20 for Exhibit 449. I have it here in front of me. We've got
21 the same number and it says, NA.

22 Now, you've never seen this before but doesn't
23 that mean not applicable, or not available?

24 MR. HAHN: Counsel, just for the report, you
25 realize we've had previous testimony regarding a computer

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1 that was -- that went down and there was financial
2 documentation, Mr. Schaffer's computer, that supported
3 that. I think Mr. Zambarano testified to that.

4 MR. ANDERSON: He may have. I read his depo
5 last night and I didn't see it.

6 But in any event --

7 MR. HAHN: I think that's the same issue.

8 BY MR. ANDERSON:

9 Q. In any event, as I go through Exhibit 449, I
10 don't find any backup for it as well. So are you aware of
11 any backup for that figure?

12 A. Not as we sit here, no.

13 Q. Do you know where it came from?

14 A. It would have come from Neal. I received this
15 from Neal.

16 Q. All right. So -- all right. Let's go to the
17 next entry in the REA on that page. HOB 17-000022. It
18 says field overhead costed to sub job contract number
19 149-200. And in parens it says delay costs. Do you know
20 where that came from?

21 A. Not as we sit here, no.

22 Q. Do you know what contract 149-200 is?

23 A. I can't be specific, but it obviously relates
24 to this contract. Some additional work that was added or
25 something.

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1 Q. Have you ever seen it?

2 A. At one time I probably did. I can't recall.

3 Q. Okay. Now the last one on that same page from
4 the REA, Exhibit 149 dash -- I'm sorry, contract number
5 149-TFC, termination for convenience for \$483. Have you
6 ever seen any backup for that figure?

7 A. I think you're wrong on your dollar number.

8 Q. I'm looking at that page. The backup for the
9 cover sheet of Exhibit 415.

10 A. I don't recall.

11 Q. On the cover sheet it says \$9,964, do you see
12 that?

13 A. Yes, I do.

14 Q. All right. Now, if we go to Exhibit 449
15 there's a TFC entry, item number 6, do you have that in
16 front of you? This is the mediation statement that you're
17 going to --

18 A. Okay.

19 Q. -- support. And it says go to Exhibit 3. And
20 Exhibit 3 is this page that shows a couple names, and it's
21 got some entries on it. It looks like it's backed up by
22 some timecards; do you see all that?

23 A. Yes, I do.

24 Q. Okay. Do you know what any of that means? Do
25 you know what the time cards are for, do you know what the

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1 entries here mean; do you know why some of it's delayed; do
2 you know why some of it's T for C?
3 A. I -- I -- I don't know. It must be -- it's
4 obviously a way they accounted for their time based on
5 trying to close out this project.
6 Q. All right. Then we've got personal --
7 professional consultant fees of \$62,927 on Exhibit 415, and
8 \$70,000 on Exhibit 449. Those would be WGK's fees; right?
9 A. Possibly, yes. They're possibly our fees.
10 Q. Well, in the -- I got your invoices that we've
11 been discussing out of the mediation statement marked as
12 Exhibit 449.
13 A. Okay.
14 Q. It says legal fees, \$116,574 on Exhibit 449,
15 but when we go to that section for backup, it says no
16 exhibits provided. Have you ever seen any legal fees or
17 legal billings?
18 A. No, I've not seen any legal bills.
19 Q. Okay. So you wouldn't be able to testify if
20 they're accurate, valid, or otherwise?
21 A. I have not seen any legal bills.
22 Q. Okay. As a result you wouldn't be able to
23 testify in the fashion I just asked you about; right?
24 A. As we sit here, no.
25 Q. Okay. Finally there's an item ten, markup at

1 for field overhead?
2 A. Correct.
3 Q. Okay. Because it's not --
4 MR. HAHN: You're just asking his
5 understanding; not a legal conclusion based -- correct?
6 MR. ANDERSON: Of course.
7 BY MR. ANDERSON:
8 Q. All right. Now, you've got five items 13, 14,
9 15, 16, and 17, regarding various CICs that total
10 approximately \$92,338. Do you see that at the bottom of
11 this mediation statement?
12 A. I see this on SE/Z's mediation.
13 Q. And when I said you, I wasn't meaning you
14 personally had done this because you've distanced yourself
15 from this document by lack of knowledge.
16 A. First time I've seen it.
17 Q. All right. Let's go to your supplemental
18 disclosure. And Exhibit D -- let's see -- set it up right.
19 If you go to page 4 of the disclosure it says
20 Mr. Kopmeyer's testimony will be consistent with the damage
21 summaries attached at Exhibit D attached hereto. Do you
22 see that language?
23 A. I see that.
24 Q. All right. Let's go to Exhibit D. And
25 Exhibit D is a chart similar to that which we've just been

1 15 percent on the items 1 through 9. Do you see that?
2 A. Yes.
3 Q. Have you ever seen markup on legal fees in any
4 claim you've ever handled?
5 A. I have seen that because I've seen it if it's
6 a cost of the project that it incurred then it's just like
7 a change order. It's just part of one of the events that
8 took place during the project and it's going to be marked
9 up.
10 Q. Now on the -- would you consider legal fees to
11 be akin to field overhead?
12 A. Legal fees?
13 Q. If they're like a change order?
14 A. If a change order asked you to include legal
15 fees it would absolutely be.
16 Q. But you typically -- you typically see a
17 markup on field orders, right; change orders in the field?
18 A. Correct.
19 Q. Okay. And so when you say legal fees are
20 analogous to a change order, that's what you're talking
21 about?
22 A. Yes. In theory the legal fees wouldn't have
23 been spent had we not been in this situation.
24 Q. Okay. And you'd have to look at the contract
25 to determine whether legal fees are allowable under, say,

1 reviewing from Exhibit 449; correct?
2 A. Correct.
3 Q. And if you put them side by side, they seem to
4 track down through items 1 through 9 -- actually 1 through
5 11; correct?
6 A. Correct.
7 Q. All right. Then it looks like CIC 154 is the
8 same?
9 A. That's not correct. They don't track.
10 There's a difference of one dollar.
11 Q. Okay. Other than that they track; right?
12 A. They're very similar except one dollar
13 difference someplace.
14 Q. Okay. Now, if you go to CIC 154 there is
15 backup provided in the mediation statement, but I couldn't
16 find any backup in your supplemental expert disclosure. It
17 stops, as far as I can tell, with this chart and the home
18 office overhead calculation. Is that your recollection as
19 well?
20 A. That all this document shows, yes.
21 Q. Okay. So are we supposed to go back to the
22 mediation statement for the exhibits that support this and
23 which are referenced on Exhibit D of your supplemental
24 disclosure?
25 A. Supposed to go back to the supporting

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1 documentation, yes.
 2 Q. Okay. Now, if you'd never seen Exhibit 449,
 3 the mediation statement, how did you approve this
 4 supplemental expert disclosure?
 5 A. I didn't approve this expert disclosure.
 6 Q. Okay. When was the first time you saw it?
 7 A. Two days ago.
 8 Q. Do you have any objection to it now?
 9 A. Not as we sit here. I'd have to look at it
 10 closer. I've not really looked at it.
 11 Q. Okay. Do you know why CIC 182, line item 14,
 12 drops from \$42,382 to \$10,734 from the mediation statement
 13 for the expert disclosure?
 14 A. I do not know.
 15 Q. Okay. Did you -- have you examined any of the
 16 backup for the CICs to feel comfortable stating that
 17 they're worth any particular amount of money?
 18 A. I did at one time. I haven't for two years.
 19 Q. Are you saying that at some point in time you
 20 had CIC files?
 21 A. I believe I've seen these. I had these in my
 22 office one time and I sent them back to SE/Z.
 23 Q. What did they look like?
 24 A. I can't recall. I just remember we had all
 25 the CICs at one time.

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1 Q. What format -- what form did they take?
 2 A. I can't really be sure. I seem to say they
 3 were in like files, file folders.
 4 Q. Any particular characteristics of those file
 5 folders that you can recall?
 6 A. No. No.
 7 Q. How -- and what did you do with those CIC
 8 folders?
 9 A. I ultimately sent them back to SE/Z.
 10 Q. Well, what did you do with them while you had
 11 them?
 12 A. We would have looked at them just to verify
 13 what kind of costs were in them, and what made up the
 14 costs. Some of the ones that are in our analysis here.
 15 Q. If there was a backup document for Hobson that
 16 said we cost a particular piece of the CIC at X, and then
 17 the CIC says this part will cost X, was that the extent of
 18 your analysis?
 19 A. We would have tried to find a backup, if there
 20 was such a thing, for Hobson also.
 21 Q. Okay.
 22 A. And if there wasn't we would have noted that.
 23 We would have told SE/Z.
 24 Q. So if you didn't do that then you somehow
 25 supported Hobson?

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1 MR. HAHN: I'm sorry. Can you repeat that?
 2 BY MR. ANDERSON:
 3 Q. If you didn't tell SE/Z to get more backup
 4 information, then you were comfortable with what Hobson had
 5 provided?
 6 A. We always told SE/Z to get all the backup from
 7 Hobson they could.
 8 Q. Okay. What does line 20 mean, markup at 15
 9 percent on subcontractor's claims? And I'm looking at
 10 either Exhibit 448 or 449. It's on both of them.
 11 A. Well, it's markup on whatever Hobson and Lea
 12 Electric claims totaled to. They're going to mark them up
 13 15 percent. And that cost is going to come back to SE/Z.
 14 That's what this means to me.
 15 Q. Well, Hobson wants over a million dollars,
 16 doesn't it?
 17 A. They want a large amount of money, yes.
 18 Q. So you're saying SE/Z is entitled to 15
 19 percent of that?
 20 A. Just like a change order.
 21 Q. Why is it just like a change order?
 22 A. If the money is authorized to pay them, let's
 23 perceive it's a million dollars for extra work they did;
 24 that's just as if the owner would have issued a million
 25 dollar change order and SE/Z would have marked it up.

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1 Q. Okay. And is that permitted under the
 2 contract?
 3 A. I don't know. It's common in what we do. We
 4 see that all the time.
 5 Q. Okay. What's in the 15 percent?
 6 A. What's in the 15 percent?
 7 Q. What makes up the 15 percent markup?
 8 A. 15 percent is a standard markup for extra
 9 work, change order work.
 10 Q. But what's it consist of? I mean, why --
 11 what's 15 percent mean? What goes into it?
 12 A. It's supposed to be some markups, profits.
 13 Q. Profits and -- I know it's a markup because
 14 it's called a markup. But other than profit, what else is
 15 included in the 15 percent, if anything?
 16 A. Well, typically it's field overhead items,
 17 things like that.
 18 Q. Okay. Not home office?
 19 A. Sometimes it can be, yes.
 20 Q. You don't know with respect to SE/Z?
 21 A. I'm not really sure as we sit here, but it
 22 could be that also.
 23 Q. What are your opinions in this case?
 24 A. The project was delayed and there were losses
 25 on this project.

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1 Q. Okay. How much was it delayed?
 2 A. The 332 days.
 3 Q. And as you sit here right now you can't tell
 4 me how you got to the 332 days.
 5 A. Specifically I can't tell you that.
 6 Q. Okay. And what damages arise as a result?
 7 Are you an expert on damages associated with the delay
 8 period? Are you offering opinions with respect to damages
 9 associated with the delay period?
 10 A. I will be offering those, yes.
 11 Q. Well, what opinions are you offering?
 12 A. That damages total a million-nine,
 13 approximately.
 14 Q. Well, that includes Hobson's; correct?
 15 A. That does include Hobson.
 16 Q. Okay. And as an expert, what work have you
 17 done to confirm that 1.9 million is actually owing on this
 18 project?
 19 A. I've just gathered all the extra cost, the
 20 claimed amounts. I've not done an in-depth analysis of
 21 Hobson's claims.
 22 Q. Okay. So you can't say that you have an
 23 expert opinion that Hobson's claims are worth what they
 24 say -- what they say they're worth.
 25 A. I have an expert opinion on how much money

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1 they want.
 2 Q. Well, that comes from reading something they
 3 wrote on a piece of paper; right?
 4 A. Correct.
 5 Q. Anybody can read that number; right?
 6 A. That's correct.
 7 Q. So that's really not an expert opinion, is it;
 8 correct?
 9 MR. HAHN: Are you asking whether he's going
 10 to testify to entitlement or what they claim?
 11 MR. ANDERSON: My question stands.
 12 BY MR. ANDERSON:
 13 Q. Anybody can read the piece of paper; right?
 14 A. That's correct.
 15 Q. All right. And you haven't done an in-depth
 16 analysis to be able to sit here and say Hobson's claims are
 17 worth X.
 18 A. No, I've not. I was not asked to do that.
 19 Q. All right. Now with respect to SE/Z. Have
 20 you done an in-depth analysis to determine that SE/Z's
 21 claims are worth a particular amount of money?
 22 A. I have looked at the costs that SE/Z
 23 transmitted to me for different breakouts of extended time
 24 and such. They all seem very reasonable. And they were
 25 all accounted for in their accounting system.

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1 Q. What costs are those? What are you saying?
 2 A. They have a job cost, they've got, you know,
 3 the phone costs, pickup truck costs, and superintendent
 4 costs, things of that nature.
 5 Q. Well, I thought you hadn't seen the data
 6 attached to the mediation statement?
 7 A. I have two sets of data that was provided to
 8 me from SE/Z that I did look at.
 9 Q. Okay. Now counsel has a blue book and a
 10 burgundy book.
 11 Can you find me the breakdown for contract
 12 149-200 in here?
 13 A. I can't do it while we're sitting here. I'm
 14 sure I could find it.
 15 Q. Okay. And so what would you call -- on the
 16 cover of this book it says schedule three dated August 17,
 17 2005. And above it it says costs for extended time. Do
 18 you see that?
 19 A. I saw that, yes.
 20 Q. All right. Do you know what schedule three
 21 is?
 22 A. No. This is from Neal. It's some way he
 23 accounts for time and cost. I don't know what schedule
 24 three is.
 25 Q. All right. So tell me what you've done in

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1 terms of your expert work regarding SE/Z's figures?
 2 A. I've told them what costs to pull out of the
 3 job cost information.
 4 Q. Okay.
 5 A. And I've looked at the cost they pulled out of
 6 their job cost information.
 7 Q. That would be in the blue book?
 8 A. It could be in either book.
 9 Q. Okay. Would the -- let's just mark these next
 10 two books as the exhibits -- next exhibits in order and
 11 we'll get them copied.
 12 (Exhibit Nos. 483 & 484 marked.)
 13 BY MR. ANDERSON:
 14 Q. Exhibit 483 is the burgundy book with an SE/Z
 15 logo on the front. And 484 is the blue book with the
 16 reference to schedule three dated August 17, 2005.
 17 Again, you don't know what that schedule
 18 references?
 19 A. I don't recall what that refers to.
 20 Q. Okay. Now, you looked at this information and
 21 your expert opinion is what with respect to this backup
 22 data?
 23 A. There didn't seem to be anything out of the
 24 ordinary for what they were accounting for for those
 25 extended periods.

50 (Pages 194 to 197)

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1 Q. And that would include -- we've talked about
2 home office overhead -- but with respect to the entries for
3 field overhead?
4 A. Correct.
5 Q. There were about three of them?
6 A. There are more than three in field overhead.
7 Q. There were three different periods of field
8 overhead.
9 A. Three different periods, yes.
10 Q. But one of the periods, almost 80 percent,
11 involves time that was still under the original contract
12 duration with the extension from change orders; right?
13 A. Perhaps. I'd have to look back at that to
14 see.
15 Q. Well, we looked at it. July 6 was the
16 extended completion date, and the first field office -- or
17 field overhead entry ran from May 1 through July 31, 2004,
18 correct?
19 A. Correct.
20 Q. So in your expert opinion is that a valid
21 approach to take with respect to a claim submitted on
22 behalf of SE/Z?
23 MR. HAHN: Object to the form.
24 THE WITNESS: At the time I looked at it, I
25 believe I did think it was a valid approach.

1 A. That's correct.
2 Q. All right. Now with respect to SE/Z's
3 damages, you've looked at some of the backup --
4 A. Correct.
5 Q. -- that's been provided. Anything else?
6 And to be fair you said it seemed reasonable
7 for the periods that they were referencing.
8 A. Yes, it did. And, you know, we've known the
9 people that run SE/Z. I've known them for over 20 years.
10 Q. Okay.
11 A. We've worked with them on several projects.
12 We've never found them to be dishonest. We've always found
13 them to be the type of contractor who's goal is to
14 ultimately finish a project on time and just be done with
15 it.
16 When they first hired us to come on this
17 project, that's what their goal was, to get out of the
18 project, be done with it, get done with it, and make the
19 State happy.
20 I don't see this contractor as one that's
21 going to deceive, or be deceptive in things they give us or
22 talk about.
23 Q. Would that affect the way you reviewed their
24 materials?
25 A. No. I would have reviewed them the same way

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1 I'm not -- I can't sit here and say that
2 because it says May 1 to July 31st, that it's really not
3 data that we pulled out from July 7 to July 31. I can't
4 say that without relooking at the information.
5 BY MR. ANDERSON:
6 Q. So you've told me about the extent of any
7 thoughts you have on Hobson's damages; correct?
8 A. Correct.
9 Q. You've told me what you believe -- I think
10 you've told me that -- well, let me just recapitulate.
11 You've told me that with respect to Hobson's
12 damages, you've looked at what they've written down but
13 nothing more.
14 A. No. I did some -- I did some looking to make
15 sure that there were backup for certain numbers. You'll
16 even see my notes in the information we gave you.
17 Q. So you looked at what they provided you and
18 saw that there was some backup for numbers that they wrote
19 down?
20 A. Correct.
21 Q. And you wrote -- looked at what they wrote
22 down and can repeat that at some point in time; right?
23 A. Correct.
24 Q. That's the extent of your work with respect to
25 Hobson's claimed damages.

1 I'd review your materials if you gave them to me.
2 Q. Any other opinions? We talked about your time
3 impact graphic, Exhibit 476. You've told us what you know
4 about the mediation statement, which set forth the claim
5 for damages. You've told us about what you knew about the
6 supplemental expert disclosure.
7 Is there anything else in terms of opinions
8 you have in this case?
9 A. Other than what I've stated in the REA;
10 probably no.
11 MR. ANDERSON: Okay. All right. That's all I
12 have.
13 MR. COMSTOCK: I have just a couple really
14 quick questions.
15
16 EXAMINATION
17 BY MR. COMSTOCK:
18 Q. What did you do to prepare for the deposition
19 today?
20 A. Not very much.
21 Q. And what do you mean by not very much?
22 A. I basically have spent -- I spent a few days
23 last week just trying to gather the documents I had. Since
24 this project was two years old we had trouble kind of
25 finding the documents. And I briefly looked at what we had

51 (Pages 198 to 201)

Page 202

1 in the boxes.
 2 But as far as reviewing actual data and stuff,
 3 I didn't do any of that.
 4 Q. Okay.
 5 A. I was not asked to and I didn't have time.
 6 Q. When did you actually fly into Idaho for the
 7 deposition?
 8 A. I would have flown in last -- I got here late
 9 yesterday afternoon.
 10 Q. Okay. Did you have a chance to meet with
 11 anyone in preparing for your deposition today?
 12 A. I had dinner with Mr. Hahn.
 13 Q. Okay. And what did you talk about?
 14 A. We talked about the Boise State football and
 15 KU football. He mentioned a few things to me. That's when
 16 I learned that the project had been torn down and rebuilt,
 17 which really shocked me. I was shocked to hear that.
 18 Q. Okay.
 19 A. But, you know, there -- we didn't talk any
 20 details.
 21 Q. Okay. You have indicated before that you
 22 believe there was possibly a number of documents that were
 23 in your possession at one time from SE/Z that have since
 24 been sent back; correct?
 25 A. I believe so. What I recall, you know, as we

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1 went through this process, Barry Hayes sent -- we would ask
 2 him to sent us stuff and he would send us originals.
 3 That's why we ended up with these original schedules.
 4 And at one time I remember when we were kind
 5 of done doing our work, he asked can you just send me back
 6 a bunch of these documents you have. And I recall sending
 7 those back.
 8 Q. And was there a specific request for certain
 9 docs to be sent back; or how did that come about?
 10 A. What all I recall is he said send me back all
 11 my originals. For some reason we didn't send back these
 12 two schedules we have because they were stuck in something
 13 else.
 14 Q. Okay. As far as gathering documents for the
 15 deposition today, you indicated that there were a couple of
 16 other individuals in your office that also worked on the
 17 project at issue in this case.
 18 A. Correct.
 19 Q. Did actually go and talk to them about, do you
 20 have a file such as the personal one that you had yourself,
 21 to see if they had any other documents?
 22 A. Yes, I did.
 23 Q. Okay. And who did you speak to specifically?
 24 A. Her name is Niru Misra, N-i-r-u, M-i-s-r-a.
 25 Q. Okay. And anyone else?

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1 A. I would have asked our secretary to go -- we
 2 have a storage closet, to go back in the storage closet and
 3 see if she could find any documentation at all referenced
 4 to this project.
 5 Q. Okay. I know I'm going to get this name
 6 wrong. Is it Gudgel?
 7 A. Gudgel.
 8 Q. Is he still with your office?
 9 A. Yes.
 10 Q. Okay. Did you go and ask him if he had any
 11 type of documents?
 12 A. No, he wouldn't have had any -- obviously, he
 13 actually quit being associated with this project when I
 14 took it over in July. Even though there's some of those
 15 e-mails sent to him, that's just Steve Zambarano. Steve
 16 Zambarano's known him for 25 years and just probably copied
 17 him on some of these. Phil has not worked on this.
 18 Q. Okay. But did you go to him and ask him if he
 19 had any?
 20 A. No. And he wouldn't have had -- Phil's office
 21 is pristine. He throws stuff out when he's done with it.
 22 When he thinks he's done with it he typically tosses.
 23 Q. Okay.
 24 A. He's that kind of a guy.
 25 Q. And as far as the documents that you sent back

Page 205

1 to SE/Z, the originals, is there a reason you would not
 2 have made a dope of those for your own type of records?
 3 A. I can't recall. We obviously didn't think we
 4 needed them anymore for whatever reason. And if I recall,
 5 it would have been a lot of them if it was those CICs. It
 6 would have been a large volume and we weren't going to
 7 spend the money to copy them if they weren't going to pay
 8 us for it.
 9 Q. And I think the last thing. As the exhibits
 10 were flying fast and furious, I don't know, we were talking
 11 about whatever Exhibit the documents in support of
 12 mediation are. Do we have that?
 13 MR. ANDERSON: 449.
 14 BY MR. COMSTOCK:
 15 Q. 449. Items -- do we have that? Great.
 16 Items 13, 14, 15, 16, and 17. Are you aware
 17 of whether or not the sub to SE/Z is also claiming a
 18 portion of these costs in their own claims in this case?
 19 A. I can't -- I can't be sure of that. I can
 20 only make an assumption just by looking.
 21 MR. HAHN: Don't.
 22 THE WITNESS: I can't be sure.
 23 BY MR. COMSTOCK:
 24 Q. We don't want an assumption.
 25 A. I don't know.

52 (Pages 202 to 205)

Page 206

1 Q. Okay. But is that -- in preparing the REA,
2 would you have made an effort to make sure to avoid any
3 type of double claims for the same items?

4 A. Yes, I would have. There was an e-mail that
5 you all had a copy of, you marked, where I made a note and
6 contacted Barry Hayes and Steve Zambarano and told them
7 found a double-dip from Hobson, and I wanted it pulled out
8 of the claim.

9 Q. All right. Okay. Well, I think Rob obviously
10 needs to get out of here. And let me just take one quick
11 flip through here but I don't think there was anything
12 else.

13 (Brief pause.)

14 BY MR. COMSTOCK:

15 Q. Last question. When we were looking at this
16 Exhibit No. 476, the time impact graphic, you had indicated
17 that all of the items in red were attributable to the fault
18 of the owner.

19 And were you speaking specifically as to the
20 owner, or was that just in reference to the owner,
21 architect, or engineer?

22 A. That was in reference to the owner, architect,
23 engineer.

24 Q. Okay.

25 A. That's correct.

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1 VERIFICATION

2 STATE OF IDAHO)

) ss.

3 COUNTY OF _____)

4
5 I, David L. Kopmeyer, being first duly sworn on my
6 oath, depose and say:

7 That I am the witness named in the foregoing
8 deposition taken the 15th day of November, 2007, consisting
9 of pages numbered 1 to 207, inclusive; that I have read the
10 said deposition and know the contents thereof; that the
11 questions contained therein were propounded to me; the
12 answers as contained therein (or as corrected by me
13 therein) are true and correct.

14
15
16 _____
17 DAVID L. KOPMEYER

18 Subscribed and sworn to before me this _____ day
19 of _____, 2007, at _____, Idaho.

20
21
22
23 _____
24 Notary Public for Idaho

Residing at _____, Idaho

25 My Commission Expires: _____

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1 MR. COMSTOCK: Okay. All right. I don't
2 think I have any more questions.

3
4 FURTHER EXAMINATION

5 BY MR. ANDERSON:

6 Q. We're back on the record. Have you had a
7 chance to review Denise Martini's report?

8 A. I don't know who that is. Is that -- was that
9 the engineer?

10 Q. Deloitte Touche's report?

11 A. No, I have not.

12 MR. ANDERSON: Okay. All right. That's all
13 have. Thank you.

14
15 (Deposition ended at 4:30 p.m.)

16 (Signature requested.)
17
18
19
20
21
22
23
24
25

Page 209

1 REPORTER'S CERTIFICATE

2 STATE OF IDAHO)

) ss.

3 COUNTY OF ADA)

4 I, PATRICIA M. BLASKA, CSR, (Idaho Certified
5 Shorthand Reporter #83) and Notary Public in and for the
6 State of Idaho, do hereby certify:

7 That prior to being examined, the witness
8 named in the foregoing deposition was by me duly sworn to
9 testify to the truth, the whole truth, and nothing but the
10 truth.

11 That said deposition was taken down by me in
12 shorthand at the time and place therein named and
13 thereafter reduced to typewriting under my direction, and
14 that the foregoing transcript contains a full, true, and
15 verbatim record of said deposition.

16 I further certify that I have no interest in
17 the event of the action.

18 WITNESS my hand and seal this 19th day of
19 November, 2007.

20
21
22 _____
23 PATRICIA M. BLASKA

Idaho CSR No. 83,

24 Notary Public in and for the
25 State of Idaho.

My Commission Expires August 22, 2009.

53 (Pages 206 to 209)

EXHIBIT D

01442

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF ADA

HOBSON FABRICATING CORP., an Idaho
corporation,
Plaintiff,

vs.

Case No. CV OC 0508037

SE/Z CONSTRUCTION, LLC, an Idaho
limited liability company; and
STATE OF IDAHO, acting by and
through its Department of
Administration, Division of Public
Works,

Defendants

SE/Z CONSTRUCTION, LLC, an Idaho
limited liability company,

Cross-Claimant/
Counter-Cross-Defendant,

vs.

Page 2

1 STATE OF IDAHO, acting by and through its
2 Department of Administration, Division
3 of Public Works,
4 Cross-Defendant/
5 Counter-Cross-Claimant.
6

7 STATE OF IDAHO, acting by and through its
8 Department of Administration, Division
9 of Public Works,
10 Counterclaimant,
11

12 vs.
13

14 HOBSON FABRICATING CORP., an Idaho
15 corporation,
16 Counterdefendant.
17

18 (Caption continued on next page)
19
20

21 Department of Administration, Division of
22 Public Works,
23 Third-Party Plaintiff,
24
25 vs.

Page 3

1 RUDEEN & ASSOCIATES, a professional
2 company, an Idaho limited liability
3 company,
4 Third-Party Defendant.
5

6 DEPOSITION OF GERALD H. WILLIAMS, JR., PhD, PE
7 Volume I, Pages 1 to 90
8

9 Taken in behalf of the Third-Party Defendant
10 Friday, November 16, 2007
11
12
13
14
15
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17
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19
20
21
22
23
24
25

Page 4

1 BE IT REMEMBERED THAT, the deposition of GERALD H.
2 WILLIAMS, JR., PhD, PE, was taken before Heather M. Ingram,
3 Certified Shorthand Reporter for the states of Oregon and
4 Washington, on Friday, November 16, 2007, commencing at the
5 hour of 8:36 a.m., the proceedings being reported in the
6 offices of Stewart, Sokol & Gray, 2300 S.W. First Avenue,
7 Portland, Oregon.
8

9 APPEARANCES:

10 STEWART, SOKOL & GRAY

11 By Mr. Thomas A. Larkin
12 2300 S.W. First Avenue
13 Portland, Oregon 97201

14 Appearing in behalf of Hobson
15

16 OFFICE OF ATTORNEY GENERAL

17 By Mr. Jeremy C. Chou
18 Len B. Jordan Building
19 P.O. Box 83720

20 Boise, Idaho 83720-0010

21 Appearing in behalf of the State of Idaho
22

23 ANDERSON, JULIAN & HULL, LLP

24 By Mr. Robert A. Anderson
25 250 South Fifth Street, #700

Page 5

1 Boise, Idaho 83707-7426
2 Appearing in behalf of Rudeen & Associates
3

4 HOLDEN, KIDWELL, HAHN & CRAPO, PLLC
5 By Mr. Frederick J. Hahn, III
6 1000 Riverwalk Drive, #200
7 Idaho Falls, Idaho 83405
8 Appearing in behalf of SE/Z Construction
9

10
11 ALSO PRESENT: Ted Frisbee
12

13 EXAMINATION INDEX

15 Examination	Page
16 By Mr. Anderson	5
17 By Mr. Chou	86

19 EXHIBIT INDEX

20 No. 485 - Hobson Final Damages Calculation;	9
21 Hobson Non Contract Work Damages	
22 Calculation	
23 No. 486 - Four-inch, three-ring white binder	8
24 containing documents reviewed by witness,	
25 retained by counsel	

2 (Pages 2 to 5)

Beovich Walter & Friend

01444

Page 6

1 GERALD H. WILLIAMS, JR., PhD, PE
2 was thereupon called as a witness on behalf of the
3 Third-Party Defendant and, after having been duly sworn,
4 was examined and testified as follows:
5

EXAMINATION

6
7 BY-MR. ANDERSON:

8 Q. Dr. Williams, I'm Rob Anderson. I represent
9 Rudeen & Associates. We've scheduled your deposition today
10 to try and determine what your testimony is going to be at
11 trial.

12 We have been provided a couple of different
13 iterations of your report, the last being a document we
14 received sometime last month, I believe. It's a four-page
15 document entitled Hobson Advancing Expert Initial Report.

16 Do you recall preparing that document, sir?

17 A. Yes, sir.

18 Q. Since that time, I believe it was provided
19 pursuant to a second supplemental disclosure of advancing
20 expert witness Gerald Williams as of August 30th, 2007.

21 We've had an opportunity to review that
22 document, and I'm prepared to ask you questions today
23 regarding that particular document.

24 Before we started the deposition, you
25 indicated that you had some copies of a new document for us

Page 7

1 to look at. We will mark that as the next exhibit in line,
2 which I believe will be 485 as soon as we get a copy here.

3 When was this document entitled Hobson Final
4 Damages Calculation prepared?

5 A. It has -- specifically, yesterday. It was --
6 it was, in fact, prepared -- iterations of it have been
7 prepared over the last month. You can go through this and
8 see what -- what that evolution is. You can see these are
9 marked up.

10 This was a reconciliation of the original
11 claim in trying to reconcile their claim documents with
12 their accounting system, and then ultimately there was an
13 earlier version or two of this, and I don't see them. I'm
14 relatively certain they're in here. Then this was just the
15 final version, which I printed off yesterday afternoon.

16 Q. All right. I see no date on it. Does your --

17 A. Oh, I didn't date it. You're right. I should
18 have dated it yesterday.

19 Q. When we get the copy for the exhibit, I'll
20 have you put the date on it.

21 A. That's fine.

22 Q. All right. And as you probably know from
23 prior depositions, this is kind of like a radio show.

24 Nobody is going to know what you're talking about unless
25 you tell them.

Page 8

1 Now, you've just referred to a notebook. What
2 is that notebook in front of you?

3 A. This notebook is pretty much the key documents
4 in the case that -- that we pulled out from all of the
5 documents that we were given in -- in -- and reviewed for
6 the purposes of this case.

7 Q. And I have also been provided a box of
8 documents.

9 Would those be the source materials for the
10 items found in the notebook in front of you?

11 A. There are other items in that notebook; for
12 example, the subpoena included -- requested all of our
13 e-mails. I believe those are in that notebook someplace,
14 or at least were. That doesn't look big enough.

15 Q. This says Volume 1 of 2.

16 A. Oh, okay. That's probably why.

17 Q. Okay. That might explain why.

18 A. So, yeah. By and large, that's the case.

19 I believe I brought up the -- all of the
20 notebooks that had the materials that we reviewed. I think
21 there's one of depositions.

22 And then this includes some documents that are
23 not in there; in particular, the -- my notes that you
24 requested.

25 Q. And when you say, "this," you're referring to

Page 9

1 what?

2 A. This notebook. I'm sorry.

3 Q. All right. I think I'm going to mark your --
4 the notebook in front of you as Exhibit 486 in its
5 entirety. And when we copy it, I'd like to have the tabs
6 recreated as well.

7 (EXHIBIT NO. 486, marked)

8 Q. Would you view your notebook in front of you
9 as the final distillation of all the materials that you've
10 been provided for review?

11 A. Yes.

12 Q. And it's from those selected materials that
13 you've prepared the latest iteration of your damage
14 analysis?

15 A. Yes.

16 Q. For the record, we haven't been provided
17 either the damage analysis or the backup.

18 What I would like to do today is explore some
19 of the areas, but by no means preclude or foreclose my
20 opportunity to come back and discuss with you what you have
21 in your notebook and how it results in your current damage
22 analysis. I don't think I can do that in the time that we
23 have allotted today, given the -- I don't know. How many
24 inches of material do you think is in that notebook?

25 A. I think it's a four-inch notebook.

3 (Pages 6 to 9)

Page 10

1 Q. Four inch?

2 A. But I could be exaggerating.
3 (EXHIBIT NO. 485, marked)

4 Q. All right. The last report that we had seen
5 from you called an Expert Initial Report, four pages in
6 length, had various areas of consideration, four in total,
7 and contained a number of references to additional audits
8 and the term to be determined, if I recall correctly --
9 maybe that was my term, TBD -- in terms of various areas
10 that it looked like you were looking at when this report
11 was prepared back in August of 2007.

12 I take it you have now had an opportunity to
13 conduct further analysis of the Hobson materials --

14 A. Yes.

15 Q. -- since this report in August of 2007 was
16 prepared?

17 A. Yes.

18 Q. And would the latest report that you've
19 provided to us, Exhibit 485, constitute the result of that
20 subsequent effort?

21 A. Yes.

22 Q. Are there any other steps that you need to
23 take, in your opinion, to further refine your conclusions
24 in this case?

25 A. I would say no; however, I would -- I would

Page 11

1 say that with a caveat. If there's something that I
2 haven't seen that pops up, then I certainly would not
3 refuse to consider it.

4 Q. Okay. But as you sit here today, you don't
5 know of anything that might pop up, and you believe that
6 you've done whatever you think is necessary to come to the
7 final conclusions you would present at trial, given the
8 information that you're aware of today?

9 A. Yes.

10 Q. All right. Now, in Exhibit 485, I see a --

11 MR. LARKIN: Which is the two-page document?

12 MR. ANDERSON: Yes.

13 Q. I see a variety of various entries.

14 Am I reading this correctly that the total
15 claim of Hobson as of November 16th, 2007 is \$490,553.08?

16 A. My analysis is that the total amount of
17 contract claims should be \$490,553.08.

18 Q. Okay.

19 A. Whether that is specifically their claim,
20 you'd have to ask the attorney, I guess.

21 Q. Okay. And the attorney has asked you to
22 analyze Hobson's claim, correct?

23 A. That is correct.

24 Q. And your conclusion is that \$490,553.08 is
25 owing to Hobson under the particular characteristics of

Page 12

1 this case?

2 A. The -- of the contract claims, the adjusted
3 total cost claim amount I came up with is \$490,553.08.

4 Q. Do you differentiate between contract claims
5 and other types of claims that Hobson may be seeking?

6 A. Hobson, originally in their REA, included what
7 I have characterized as noncontract claims, which were
8 claims that -- that are really subject to the award of the
9 court. Those are found on page 2 of this document. These
10 include interest on the award amount, claim paid -- that
11 they paid through to SE/Z, outside accounting consultants,
12 attorneys' fees. There are two sets of those.

13 Internally, they have spent a fair amount of
14 time -- in fact, according to Hobson, 2,775 hours -- I'm
15 sorry, 2,975 hours in total between Randy and Ted Frisbee.
16 There's an estimate of attorneys' fees for Stewart, Sokol &
17 Gray, and there's an estimate of my firm's fees as well,
18 which add to something over a million, \$1,012,302.01. How
19 in the heck I got one cent I -- that's the interest
20 calculation.

21 In any case, those, while they were in the
22 original REA, I think they were wrongfully in the original
23 REA as contract claims.

24 In terms of their contract claims, which
25 resulted from the work on the job, the total amount -- or

Page 13

1 maximum amount is \$490,553.08.

2 Q. Okay. Thank you.

3 When were you first retained on this case?

4 A. I believe it was June of 2007. And I have --
5 you've requested billings. There are four billings. The
6 first one was June 30th, so I would say June -- I think the
7 first date I charged anything to the job was June 13th,
8 2007.

9 Q. Okay. Have you worked with the firm of
10 Stewart, Sokol & Gray before?

11 A. As you know, or probably know, our offices are
12 downstairs. We are a tenant of Stewart, Sokol and Gray's
13 building.

14 I personally have worked very little for
15 Stewart, Sokol & Gray myself. My partner, Perry Smith, has
16 an ongoing case, and my other partner, Roger Brown, has
17 done some.

18 But for the six years that we've been here,
19 Tom, we've done surprisingly little. Actually, we've done
20 more cases adverse to Stewart, Sokol & Gray than we have
21 for them.

22 Q. And how many would that be?

23 A. And we've won them.

24 MR. LARKIN: Not all. Move to strike.

25 A. I believe three.

4 (Pages 10 to 13)

Beovich Walter & Friend

01446

Page 14

1 Q. What is it that you were asked to do in June
2 of 2007?
3 A. I was asked to principally review the REA and
4 evaluate the damages.
5 Q. I take it near June of 2007, you were provided
6 a copy of the REA?
7 A. Yes.
8 Q. And in the box sitting beside me, it looks
9 like we have three volumes.
10 Would that be what you recall the REA coming
11 to you -- or the form in which the REA came to you?
12 A. Yes.
13 Q. And you've gone through this?
14 A. I have gone through it. I've had staff go
15 through it as well.
16 Q. Okay. How much staff work have you utilized
17 on this project for Hobson?
18 A. Characterize by what you mean by how much
19 staff. I mean, are you talking about hours or dollars?
20 Q. Do you have an assistant who has assisted or
21 helped you on this project?
22 A. Yes.
23 Q. Who would that be?
24 A. Rob Fleskes, and I'm trying to think of --
25 Lori has worked on -- Lori Lyons Lockman may have worked

Page 15

1 it. We have a secretary, Frieda Miller. I'm not sure if
2 McCabe Carcher has worked on it.
3 I -- I -- we could probably tell by going
4 through this. Principally, it's been Rob Fleskes and me.
5 Q. All right. And who is Rob Fleskes?
6 A. Rob Fleskes is an associate with the firm.
7 Q. What is his background?
8 A. He was with a company called Harder Mechanical
9 for a number of years. So he has a background in
10 mechanical construction.
11 Q. Okay. Is he an engineer?
12 A. No, he is not.
13 Q. He was on the contracting side?
14 A. Yeah. He has an undergraduate degree in
15 construction management from Oregon State University. He
16 spent -- he's retired now from Harder Mechanical. He spent
17 his entire career with them.
18 Q. And his time is accounted for on your
19 billings?
20 A. Yes. It's accounted for as, I believe, senior
21 analyst here. So wherever you see senior analyst, that
22 would be his time.
23 Q. Okay. If you could, just give me a general
24 background, a thumbnail sketch of what you did from June
25 on.

Page 16

1 A. I -- we went through the REA and tried to kind
2 of evaluate the REA with respect to how much they were
3 asking for and then ultimately attempted to reconcile that
4 with the -- with the accounting costs. That's how we
5 ultimately ended up with the document that we've talked
6 about, Exhibit 485.
7 Q. 485.
8 A. We went through several iterations to get to
9 485, which are contained in this notebook.
10 We had discussions back and forth with Hobson
11 about -- questions about, Well, certain aspects of the
12 claim, where those fit into the actual accounting of the --
13 of their accounting system and job costs.
14 Q. In other words, how were they supported?
15 A. Yes.
16 Q. Okay. And those discussions were both in
17 person and by telephone or correspondence?
18 A. Yes, correspondence limited to e-mail.
19 Q. Okay. And you've produced a couple thousand
20 e-mails. I don't know how many are in here.
21 A. Well, I think that what you'll find is there
22 are probably about 50 e-mails between us, I would guess.
23 There may be more, including with counsel.
24 But as you're probably aware, every time you
25 produce an e-mail that -- if I e-mail you, you e-mail me

Page 17

1 back, I get that original e-mail with it. And if I
2 respond, then you end up with that whole e-mail string.
3 That happens to be the case here. There's a
4 tremendous amount of duplication. But since the subpoena
5 really didn't say not to produce the duplicated e-mails, I
6 just produced everything that came out of the machine.
7 Q. Note to self.
8 MR. LARKIN: With attachments?
9 THE WITNESS: With -- you know, the
10 attachments are not -- I didn't include the electronic
11 attachments. They say they're there, but I believe all the
12 attachments are included here.
13
14 BY-MR. ANDERSON: (Continuing)
15 Q. They've been hard copied to your notebook --
16 A. Yeah.
17 Q. -- which is Exhibit 486?
18 A. Yes. I believe that's the case.
19 Q. Okay.
20 A. Because a lot of those are documents that were
21 support documents that we requested, and they're in here.
22 Q. Okay. So that -- again, if you could, take
23 me -- if you need to look at your time slips, please feel
24 free to do so. But give me a general overview of what
25 you've done between June and today on this case.

5 (Pages 14 to 17)

Beovich Walter & Friend

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1 A. Okay. We reviewed the REA. We tried to
2 reconcile that with the accounting system on a
3 point-by-point basis.

4 We were not entirely successful in doing so
5 and -- which is why we calculated the -- the alternate
6 method of calculating the damages.

7 I think it needs to be pointed out that the
8 REA was, you know, prepared by Hobson and -- internally.
9 They're contractors. They're not claims specialists or
10 claim preparers. As a consequence, they -- they went about
11 it the way that they felt they needed to, but I put it
12 together in a different manner, and I attempted to kind of
13 follow through on -- it's always best to do a
14 point-by-point, you know, calculation, if you can.

15 Kind of to get a feel for what the boundaries
16 of the claim should be, I wanted the accounting information
17 ultimately reconciled -- tried to reconcile the accounting
18 information with the claim, and that's what resulted in
19 485.

20 Q. Okay. You said or mentioned an alternative
21 method of calculating the claim.

22 Would the alternative method be that which you
23 used for Exhibit 485?

24 A. Yes.

25 Q. Is there some way to reconcile what your

Page 19

1 initial report came up with versus your final report?

2 A. Well, I think that the initial report said
3 that we went through the REA. They had a lot of
4 information. It appeared to be accounted for with backup

5 It -- I believe that we stated in the -- in
6 the report that we were going to do an ongoing audit of the
7 accounting information.

8 In the process of doing the ongoing audit or
9 process of doing the audit, we found that a better way, or
10 at least a way of reconciling those two, was to look at
11 really what were the total costs on the job and -- as
12 opposed to trying to put them into each little individual
13 bucket, which is what Hobson did in their REA.

14 So we used just a common adjusted total cost
15 method.

16 Q. Have you used the total cost method before for
17 construction claims?

18 A. Yes, I have.

19 MR. LARKIN: Total cost or adjusted total
20 cost?

21 Q. Did you say adjusted total cost?

22 A. I did.

23 Q. Okay. My question will still stand: Have you
24 ever used, successfully, the total cost method for
25 presenting a claim?

Page 20

1 A. The total cost method is a disfavored method
2 for a number of reasons, one of which is that there are
3 four underlying assumptions that have to be met, one being
4 that the initial estimate was proper, that the -- one being
5 that the contractor didn't have any self-inflicted wounds,
6 one being that there is no alternative method for
7 calculating the damages. I can't really remember what the
8 fourth one is. What we did was an adjusted total cost
9 method.

10 To answer your -- to answer your question
11 specifically, it's not a favored method. I would rather be
12 able to calculate them individually.

13 Q. How do you define the adjusted total cost
14 method of analyzing a construction claim?

15 A. It's -- you take the total cost method,
16 essentially as I described, and then you adjust it for
17 self-inflicted wounds.

18 Q. Okay. And where do you get the total cost?

19 A. From the accounting.

20 Q. Okay. If you have a project that, say, has a
21 termination date of June 5th, 2005, do you stop at that
22 point in terms of what your total cost is that is later
23 adjusted, or do you continue through, say, to the present?

24 A. I think that there's -- that's questionable.

25 I don't know that there's a bright line between those two.

Page 21

1 I think it's arguable. It kind of depends really on what
2 it is that those job costs are that are being applied.

3 I think that it is probably more prudent to
4 have a cut-off date someplace along the line. I would
5 state that in this case, the last one that we received had
6 costs all the way through to August, I believe, of 2007.
7 These are ongoing costs that they are charging to the -- to
8 the job.

9 Q. Which cut-off date did you utilize in your --

10 A. I used the last one that they gave me.

11 Q. Through August of 2007?

12 A. Whatever the last date they gave me was, yes.

13 Q. Why did you pick that date?

14 A. It was the -- frankly, it was the last one
15 they gave me.

16 Q. When was the last day that Hobson performed
17 substantive work on the project?

18 A. Well, it would be --

19 MR. LARKIN: I'll object to form.

20 A. Yeah. Substantive, define that.

21 Q. Where they actually had forces on the job
22 doing something.

23 A. It would be in June of 2005, I believe.

24 Q. And what do you recall them doing in June of
25 2005?

6 (Pages 18 to 21)

Page 22

1 A. Demobilizing from the job site.
 2 Q. Okay. And --
 3 A. That was -- that was when the termination
 4 occurred.
 5 Q. Right. Other than demob in June of 2005, when
 6 was the last time that they performed any substantive work
 7 on the project prior to that time?
 8 A. Well, it would have been in June 2005, prior
 9 to the termination.
 10 Q. What were Hobson forces doing in June of 2005
 11 prior to --
 12 A. Specifically, I --
 13 Q. Let me finish the question -- prior to
 14 demobilization?
 15 A. I believe that what they were doing prior to
 16 demobilization was trying to get the system to balance.
 17 Q. And what role did Hobson have in that?
 18 A. Well, they were the mechanical contractor. So
 19 they had a -- a role to play.
 20 I'm not specifically sure what the guys were
 21 doing on a day-to-day basis.
 22 Q. Would it be important, in terms of you picking
 23 the point at which you determined the final cost of the
 24 project, to try and isolate what the contractor was doing
 25 on the job?

Page 23

1 A. Well, I know what they were doing on the job.
 2 They're the mechanical contractor. They did the HVAC
 3 system.
 4 Q. Okay. That's a pretty broad definition. I'm
 5 asking for a little bit more particularity, if you could.
 6 Would it be important to know what the
 7 general -- or what the mechanical contractor was doing on
 8 the job in terms of you, as the analyst, trying to figure
 9 out what cost you need to deal with?
 10 A. Well, certainly you want to know what work
 11 they're doing.
 12 I was presented with an accounting -- job cost
 13 accounting that ran through, you know, much later than
 14 after the job. I'm not sure exactly what they were doing
 15 to run up those costs, but -- or to add to those job costs.
 16 I don't think they were terribly -- I don't
 17 think there was a lot of cost after that, but --
 18 Q. Have you looked at a job cost report that
 19 stops on June 5, 2005?
 20 A. No.
 21 Q. You've isolated or segregated contract versus
 22 noncontract claims?
 23 A. That is correct.
 24 Q. Was there any contract work done after June 5,
 25 2005 by Hobson?

Page 24

1 A. Well, I don't know.
 2 Q. Well, wouldn't that be something you'd want to
 3 know in order to perform an adjusted total cost analysis of
 4 the contract work claim?
 5 A. On this case, because it was a termination for
 6 convenience, in addition to the contract work, specifically
 7 which you asked, you're allowed reasonable costs to
 8 demobilize and essentially finish up, bring all the -- tie
 9 up all the loose ends. That is not -- those are not
 10 contract work, but it's allowed under the contract.
 11 So I don't know how long it took them to tie
 12 up all the loose ends. They've presented me with a job
 13 cost accounting. That's what the \$800,000 is.
 14 Q. Have you isolated a termination for
 15 convenience claim that Hobson is making?
 16 MR. LARKIN: You mean other than 485?
 17 MR. ANDERSON: The question stands.
 18 MR. LARKIN: You can answer if you understand
 19 the question.
 20 MR. HAHN: I object to the form.
 21 THE WITNESS: How --
 22
 23 BY-MR. ANDERSON: (Continuing)
 24 Q. Have you located or reviewed any particular
 25 termination for convenience claim which Hobson is making in

Page 25

1 this particular case?
 2 A. They've made a --
 3 MR. HAHN: Same objection.
 4 MR. LARKIN: I object to the form, too.
 5 THE WITNESS: I believe that's the claim that
 6 is being made.
 7
 8 BY-MR. ANDERSON: (Continuing)
 9 Q. Okay. A moment ago you said that under the
 10 contract, they're entitled, after a termination for
 11 convenience, to tie up some loose ends and basically demob
 12 from the job, correct?
 13 A. Well, I believe that demob from the job is not
 14 the totality of tie up loose ends.
 15 Q. Well, have you reviewed the contract to
 16 determine what is allowed for a termination for convenience
 17 claim?
 18 A. I have reviewed the contract --
 19 MR. HAHN: Object to the form.
 20 A. -- but I don't think that it is so specific
 21 that you'd say, you know, This is allowed and this is not
 22 allowed. It says reasonable costs, I believe.
 23 Q. You've presented us with a contract claim and
 24 a noncontract claim on behalf of Hobson in Exhibit 485,
 25 right?

7 (Pages 22 to 25)

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1 A. Correct.
 2 Q. In your contract claim, have you provided any
 3 analysis of what Hobson would be entitled to as a result of
 4 the notice to terminate for convenience from the State?
 5 A. I believe that's what 485 is.
 6 Q. Okay. So you lump everything into a
 7 termination for convenience claim?
 8 A. No. Well, the --
 9 Q. I thought you --
 10 A. The contract claim's in the first page of 485;
 11 the second page, which is the -- what I call the
 12 noncontract claims, which are subject to award by the Court
 13 and not part of the claim.
 14 So I would say that the \$490,553 is the --
 15 what I consider to be the maximum amount allowable under
 16 the termination for convenience for the contract work.
 17 So under the contract, termination for
 18 convenience, \$490,553.08.
 19 Q. Okay. What portion of the contract are you
 20 relying on to support that claim? Can you turn to it,
 21 please?
 22 A. I can't turn to it, no.
 23 Q. Do you have the contract in your materials?
 24 A. I do have the contract in here.
 25 Q. Okay. Why don't you turn to Article 14 and

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1 tell me what language you are relying on to support the
 2 conclusion that \$490,553.08 is an appropriate T for C
 3 claim.
 4 MR. LARKIN: I'm going to object to form.
 5 This is after you and the State objected to
 6 Mr. Williams opining as to entitlement under the contract?
 7 I mean, I want to get this straight. You want him to point
 8 to you and show you where the entitlement is? Is that what
 9 you're asking for?
 10 MR. ANDERSON: I'm just asking if he has a
 11 particular portion of the clause that he reviewed in
 12 support of his conclusion.
 13 MR. LARKIN: Okay.
 14 BY-MR. ANDERSON: (Continuing)
 15 Q. Let me ask a broader question.
 16 Did you feel that it was necessary to review
 17 the contract in any way as you were preparing your claim
 18 regarding the contract damages?
 19 A. Sure.
 20 Q. Okay. And why was that?
 21 A. Because the contract generally -- specifically
 22 rather, tells you what you're entitled to.
 23 Q. Okay. Have you been provided the Court's
 24 orders with respect to the contract, interpretation of it
 25

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1 by the Court?
 2 MR. HAHN: Object to form.
 3 A. I have -- I've received -- I have received
 4 some orders. I have been -- they've been translated for me
 5 by the attorneys. They've told me -- what they indicated,
 6 among other things, was the Eichley damages that were in
 7 the original claim were struck by the Court.
 8 I don't believe that I've seen -- I don't know
 9 that I've reviewed any other specific things that I can
 10 recall off the top of my head.
 11 Q. Okay.
 12 A. I know I received stuff.
 13 Q. Okay.
 14 A. I don't remember.
 15 Q. Let me ask a broad question.
 16 A. Okay.
 17 Q. Have you modified your analysis of the
 18 contract damages based upon what the Court has deemed to be
 19 a proper interpretation of the contract?
 20 A. Yes.
 21 Q. In what way?
 22 A. We struck the Eichley damages.
 23 Q. Okay. With respect to the subcontractors as
 24 well, Hobson subcontractors, RM? ATS?
 25 A. You know, that's a good point. I don't recall

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1 that we went back and made that modification. To the
 2 extent that we did not, we need to do that.
 3 MR. LARKIN: If -- if there was home office in
 4 those?
 5 THE WITNESS: If there were Eichley damages in
 6 the sub claims, I did not go back and make those changes,
 7 but they should be made.
 8 BY-MR. ANDERSON: (Continuing)
 9 Q. Do you have those claims?
 10 A. The sub claims? Yeah, they're right here.
 11 Do you want me to take them out and hand them
 12 to you?
 13 Q. You keep the book over there. We'll just take
 14 a peak at what you have.
 15 Start with RM Mechanical -- or if you have
 16 ATS, that's fine. Go to that one first.
 17 A. I'm just looking to see if they have -- they
 18 have a field extended costs, extended -- office extended
 19 costs.
 20 I assume those are -- well, they have no field
 21 extended costs. I don't know what their office extended
 22 costs -- if those are Eichley damages. It's not calculated
 23 as an Eichley damage here.
 24 Q. It's \$18,453?
 25

8 (Pages 26 to 29)

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1 A. Yes.
 2 Q. And for RM Mechanical, of their \$36,973, they
 3 have \$24,982 for office extended costs?
 4 A. Correct.
 5 Q. And Ro-Bar, do you see any home office in
 6 there?
 7 A. I don't.
 8 Q. It says, "Allocable project overhead, \$3,782."
 9 A. Well, is that -- allocable project overhead,
 10 is that an Eichley damage? It has 117 units, \$21.37 a
 11 unit. I'd have to go back and take a look at what it
 12 means.
 13 Q. All right.
 14 A. To the extent that -- to answer your question,
 15 to the extent that there are home office overhead that have
 16 been struck by the Court, we need to make those changes.
 17 Q. All right.
 18 A. And I apologize they didn't get made.
 19 Q. Okay. Now, we were talking about the Court's
 20 orders.
 21 You're aware that the Court has opined that
 22 change orders 10, 12 and 13 preclude any further recovery
 23 for the subject matters of those three change orders?
 24 MR. LARKIN: Object to form.
 25 MR. HAHN: Join.

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1 A. Specifically, I don't recall seeing that, but
 2 I would -- that's the way I would interpret it, too.
 3 Q. Okay. Have you ensured that your latest
 4 damage calculation does not include items dealing with the
 5 subject matters of those three change orders?
 6 A. No.
 7 Q. Okay. Change order 10 was, I believe, the hot
 8 gas bypass; change order 12 was the continuous butt welding,
 9 and change order 13 dealt with the humidifiers.
 10 Are you familiar with those generally?
 11 A. Generally, yes; specifically, no.
 12 Q. Okay. Was it not part of your task to kind of
 13 commit any of this to memory in terms of the nuances of
 14 each of the issues raised in the REA?
 15 A. We went through them. And, you know, again,
 16 my view was I was trying to look and evaluate the costs and
 17 the -- so I went through those or we went through them and
 18 evaluated the costs and then tried to reconcile those with
 19 the accounting system.
 20 We were somewhat frustrated in doing so and --
 21 which is what resulted in the adjusted total cost claim
 22 amount.
 23 Q. Okay. In other words, you moved away from
 24 trying to isolate a particular event and then trying to
 25 conglomerate all of the costs associated with that event?

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1 A. Yes, sir.
 2 Q. All right. Let's, if we could, turn to 485,
 3 please. Let me make sure I understand the general
 4 parameters you've set out here. You start with the
 5 original contract amount of \$657,500.
 6 Do you have backup in your notebook for that,
 7 or is that just a number you pulled from somewhere else?
 8 A. We have the original contract someplace.
 9 That's where I -- you know, it's documented in several
 10 places.
 11 Q. Okay. My question is designed to just try and
 12 figure out what you do have.
 13 Do you have the subcontract? It's Exhibit 2
 14 to the various depositions that we've taken in this matter.
 15 A. I -- I believe I -- I tried to pull this stuff
 16 together out of everything we had; frankly, I just
 17 assembled this notebook pursuant to your subpoena to try
 18 and get all the stuff in here so that I would have one
 19 thing that I could refer back to.
 20 It was originally in a number of different
 21 notebooks and locations. I may have missed bringing one
 22 thing or another in.
 23 Q. Okay. Are there materials which you have been
 24 provided or you have generated that aren't in the room with
 25 us today?

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1 A. There are no materials that we have generated
 2 that are not in the room today, I believe, except with
 3 the -- with the possible exception of some electronic case
 4 files that I may not have printed out.
 5 Q. What would they contain?
 6 A. Oh, just earlier versions of stuff like this
 7 possibly.
 8 Q. Stuff like what?
 9 A. 485.
 10 Q. Oh.
 11 A. I mean, we've -- I think I've gotten most of
 12 them in here. You know, there's reconciliations and prior
 13 spreadsheets. Notes are generally all handwritten.
 14 They're in here, you know, to the extent that I take notes.
 15 I don't know if there are any prior versions
 16 of the report which you have in front of you.
 17 Q. The two-page 485?
 18 A. No, no, the one on your left, my right. That.
 19 Q. The initial report?
 20 A. Yes. I don't know if that's a -- if you have
 21 an exhibit number on there.
 22 I don't know if there's -- there may be some
 23 electronic somewhat earlier version of that. I believe
 24 that I -- I probably have just written over them, but I'm
 25 not sure if it's saved someplace.

9 (Pages 30 to 33)

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1 By and large, the answer to your question is
2 yes.

3 The second question -- or second part of your
4 question, which is, is there anything we've reviewed that
5 is not in this room, the answer to that is yes. There's a
6 ton of documents on this project, a lot of which we
7 reviewed and discarded with respect to our own scope of
8 work because they weren't --

9 Q. Tell me what that means. You've reviewed what
10 and done what with those materials?

11 A. Well, there's a number of materials that -- if
12 you have walked in the back room here of Stewart, Sokol &
13 Gray, they've got, I think, several hundred notebooks of
14 materials on this case. A lot of those don't pertain to
15 our scope of work, which is primarily to evaluate the REA.

16 MR. LARKIN: He's had access to the
17 DPW-produced documents, the Hobson-produced documents and
18 the --

19 MR. ANDERSON: Okay.

20 BY-MR. ANDERSON: (Continuing)

21 Q. I'm interested in which of those documents
22 you've looked at and utilized in your analysis. Is there
23 any way to tell that?

24 A. Well, I think the most important documents
25

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1 that we've utilized here in this calculation are in this
2 book.

3 Q. Okay. Those would be documents that support
4 your conclusions?

5 A. These would be primarily the accounting
6 documents.

7 Q. And you utilized those accounting documents to
8 support your conclusion?

9 A. To come up with the numbers. The conclusions,
10 it's just math. I mean, they're not -- they're -- to -- to
11 state -- to state that they are conclusions would be to
12 imply that there's an opinion involved in math.

13 And when I subtract, you know, 813 from -- or
14 934 from 846 based on the accounting information, that's
15 not an opinion. That's just math.

16 Q. Okay. And then perhaps some of my questions
17 stem from the fact that I haven't seen your math before,
18 and so I'm trying to figure out just what we're dealing
19 with here.

20 With respect to the documents you've looked at
21 in the back room, is there a way to tell which ones you
22 utilized in your math?

23 A. Again, I guess the answer to that is no.

24 Q. Okay. You've pulled some and used them as
25 backup for your final damages calculation, Exhibit 485; is

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1 that correct?

2 A. Yes; however, I would also say that final, I
3 guess, is not the appropriate deal -- or appropriate name
4 since you have pointed out that some home office overhead
5 in the subcontractor claims needs to be adjusted out of
6 this as well. So I -- maybe it should be semifinal.

7 Q. Okay. And have you made any effort to
8 determine if the total amount charged the job that you have
9 in your fourth line of Exhibit 485 from the 11/12/2007 job
10 transaction report involves time -- or dollars spent on the
11 issues addressed by change orders 10, 12, 4, 13?

12 A. No, sir.

13 Q. Let's just go down the line here so I can get
14 a general overview of what you did. You took the original
15 contract amount and then took the change orders.

16 I take it at some point you reviewed change
17 orders, or is this just a figure somebody gave you?

18 A. Well, we have the change orders. We totaled
19 them up.

20 Q. Okay. And you have them where?

21 A. They are here. There's a section here that
22 says, "Change Orders."

23 Q. Okay. Can you just turn to that real quickly
24 and tell me which range of numbers you have for the change
25 orders?

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1 A. I just threw all of these things in here.

2 Q. Do you have a recap of them?

3 A. I don't have a recap here, I don't believe.

4 These are change orders that -- here's change order number
5 13, number 12, number 11, number 10, number 9, number 8.
6 This is another copy of 12. Here's number 5, 4-1. I think
7 ultimately there's 3, 2 and 1.

8 If you go to the last one, you have the total
9 amount here, which results in \$735,155.21, which is the
10 number there -- well, I left off the 21 cents.

11 Change order number 13 says -- it states up
12 here, "Original contract amount, 657,500. Change order is
13 total of" -- what is it? It's 760 plus the 130 or -- the
14 166,063 here. That comes to a total of 735,155.21, which
15 is essentially the number that you have here.

16 Q. Okay. If I followed you --

17 A. Sure.

18 Q. -- you have change orders 1 through 13?

19 A. Correct.

20 Q. All right. Then you have an entry for the job
21 transaction -- I think it's called detail report -- that I
22 referenced a moment ago. It's dated November 12th, 2007.

23 Is that just the most recent job transaction
24 report that you've received or the only job transaction
25 report you've received?

10 (Pages 34 to 37)

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1 A. No. I actually have a couple of them, but it
2 was the one that was sent to me just most recently.

3 The only other one -- actually, I take that
4 back. We have two, may have three. They were faxed to me.
5 This one was sent electronically, and it's in here.

6 Q. Okay. Do you know what is being charged to
7 the job, say, in 2007?

8 A. Labor.

9 Q. To do what?

10 A. I don't know what it's to do. It's just
11 charged as labor.

12 Q. Okay. So if I understand your role in this
13 case, it is not to analyze the legitimacy of any particular
14 entry? It's just to locate various numbers and try to
15 organize them in an understandable way?

16 MR. LARKIN: Object to form.

17 A. Boy, I would hope that's not the only thing I
18 did.

19 Q. Well, remember you said it's just math?

20 A. That part is true.

21 Q. It's not conclusions. It's just numbers. So
22 I'm trying to show you that I'm actually listening.

23 If you were to expand your role to determine
24 the legitimacy of the numbers that you've put on 485, would
25 it be incumbent upon you to review what went on, for

1 don't know.

2
3 BY-MR. ANDERSON: (Continuing)

4 Q. You haven't drilled into it?

5 A. I have not drilled into it.

6 Q. Okay.

7 A. In large part it's because, again, the
8 approach that we've taken here has evolved over time from
9 looking at the individual specific things to just looking
10 at the more gross number.

11 Q. Okay. You've accepted all charges to the job
12 per the job transaction report through November of 2007.

13 Is there a particular part of the contract you
14 were relying on or reviewing that indicated to you that was
15 the appropriate approach to take?

16 A. Well, when it says, "All reasonable charges
17 pursuant to the termination for convenience," I have made
18 the assumption that the accountants in -- that have put
19 together the charges were only charging reasonable costs.

20 If they're charging unreasonable costs, I have
21 not had the opportunity to audit those yet.

22 Q. Okay. So we've got the total charge to the
23 job.

24 A. Uh-huh.

25 Q. Did you ever ascertain what the original bid

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1 example, in 2007 and why it's being charged to the job that
2 ended in June of 2005?

3 MR. LARKIN: Object to form. "Legitimate" is
4 ambiguous.

5 Do you mean legitimate per the contract terms
6 or a legitimate number? A legitimate cost incurred?

7
8 BY-MR. ANDERSON: (Continuing)

9 Q. Do you have a problem with the question? I'll
10 be glad to try and clear it up. Why don't we have it read
11 back. Maybe that will help us through it.

12 (Reporter read as requested)

13 MR. HAHN: Object to the form.

14 THE WITNESS: I understand Tom's objection.
15 You know, legitimacy to the number in terms of the
16 entitlement to whether or not they ought to receive payment
17 for the amount that has been charged as opposed to the fact
18 that they've been charged.

19 Were they legitimate -- were those charges
20 actually reflected in this document? I mean, obviously
21 they are.

22 So to the extent that there are charges in
23 there that are dated after June 2005, they have put those
24 in the job cost accounting.

25 Whether -- what they did during that time, I

1 or estimate for the job was by Hobson?

2 A. It's right here. I looked at it a second ago.

3 Bid, 536,000 was the cost, and then they added overhead and
4 profit to come up with their 657.

5 Q. Okay. And the next line after the total
6 amount charged to the job is, "Fee based on bid at 15%"

7 Where is that from?

8 A. Hobson -- well, from their original bid in --
9 they gave a number of 536, and then overhead and profit
10 coming to 657.

11 Hobson's -- Mr. Frisbee over here indicated to
12 me that they -- how they came up with their bid was 10
13 percent for overhead and 5 percent for profit, so the fee
14 being 15 percent.

15 Q. Okay. And what did the overhead consist of?

16 A. Well, a company like Hobson has -- charges
17 certain things to just an overhead account. Those things
18 include equipment.

19 And, surprisingly enough, a lot of small,
20 particularly equipment-intensive companies, for reasons
21 which I, frankly, don't entirely understand, charge things
22 like equipment to just overhead accounts as opposed to
23 costing them out specifically, which is more common in
24 other cases.

25 So they have, you know, taxes as an overhead.

11 (Pages 38 to 41)

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1 Their home office overhead is in there. The -- you know,
2 the thing that pays the president's salary and that type of
3 stuff is generally looked at as G and A or, you know,
4 overhead accounts.

5 Q. If home office overhead is not a permissible
6 component of a contract claim pursuant to the waiver
7 contained in the contract, why have you included home
8 office overhead in that 15 percent?

9 MR. LARKIN: Object to form.

10 A. The -- as I understand it, the Eichley damages
11 were -- were taken out. Eichley damages are for extended
12 home office overhead for delay. It's a specific type of
13 damage.

14 And as you I'm sure are aware, what happens in
15 a construction environment is that you have a set amount of
16 time to make a set amount of money, and you depend upon
17 the -- the fixed amount of money to pay your home office
18 overhead.

19 The plant that makes the money for a
20 contractor are the guys in the field. And if you extend
21 the time to do the work, then you're -- you have an
22 unabsorbed part that -- you're not getting any more money
23 for doing the work.

24 Now, this is an analysis that implies that
25 you're getting more money. And so the money -- the more

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1 in those pages prior to the total?

2 A. Correct.

3 Q. Okay. Let me, if I can just take a peak at
4 that.

5 How do you classify Phil Wilt's time, or do
6 you know who he is?

7 A. I don't know who he is.

8 Q. If he were classified as a home office
9 personnel, would you consider his time to be inappropriate
10 in this particular compilation of costs?

11 MR. LARKIN: Object to form.

12 A. You know, I'd have to ask their accountant
13 more specific information. I mean, home office --
14 contractors of -- of this type and other contractors may
15 not have their project manager out in the field or even
16 superintendents out in the field. That doesn't mean that
17 he's a support person.

18 Now, if this person is a secretary that's
19 answering phones, certainly, you know, for the -- when you
20 call in to the -- Hello, this is Hobson Financing -- or
21 Hobson Fabricating, then certainly that person would not be
22 appropriately charged to the job, but they may be
23 physically in the home office and appropriately charged to
24 the job.

25 If you're buying pencils for the president of

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1 money you get, just like with a change order, you get
2 overhead just as we've done here. Essentially it's like
3 saying this is a change order.

4 Q. Let's go back to the job transaction detail
5 report.

6 Does it contain hours for Mr. Ted Frisbee?

7 A. No.

8 Q. You've taken those out?

9 A. We've gone through them. I believe that they
10 are not -- there are no hours in there charged for Ted.

11 Q. Or for Bob Frisbee?

12 A. I believe there's none in there that -- we
13 found none in there for Bob Frisbee. There's one Frisbee
14 in there. Maybe it's Bob or Randy, one of the two.

15 One of the three Frisbees are in there, and we
16 have taken those out.

17 Q. Okay. So I guess I'll figure this out as we
18 go.

19 In the job transaction -- let's just turn to
20 it. Could you turn to the November 12th, 2007 job
21 transaction report, please.

22 A. It's right here.

23 Q. Okay. Now tell me what the total is, please.

24 A. 813,014.89.

25 Q. Okay. And that includes all of the components

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1 the company, that's not an appropriate job cost. That's an
2 overhead cost.

3 Q. Have you read Mr. Frisbee's deposition, Ted
4 Frisbee's deposition?

5 A. I've not read the entire deposition, no. I
6 read part of it, but I haven't read the entire thing.

7 Q. Do you recall which part you read?

8 A. I don't know. It's been some time, and I've
9 read several depositions since.

10 Q. I take it somewhere you have some depositions?

11 A. I believe they're in there.

12 Q. You're referring to the box that we have been
13 provided?

14 A. Yes.

15 Q. All right. So you think it's appropriate,
16 based on this analysis that you've provided in Exhibit 485,
17 to add 15 percent to the total amount charged to the job
18 because 15 percent was used by Hobson in calculating its
19 original contract amount?

20 A. That is correct.

21 Q. All right. Now, where did you get the total
22 amount paid by SEZ/DHS?

23 A. I got that from the accounting -- or from the
24 accountant, Rob. I don't recall his -- Ron. I can't
25 recall his last name.

12 (Pages 42 to 45)

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1 MR. LARKIN: Mullen.
 2 A. And we confirmed -- I confirmed that
 3 yesterday. I just wanted to make sure.
 4 Q. And you have a note that -- what is DHS?
 5 A. Department of Health Services, I think. I
 6 believe that's the owner, Department of Health Services.
 7 MR. LARKIN: The State.
 8 Q. Okay. And then you calculated the difference,
 9 and it says, "Claim amount based on TCM."
 10 A. Total cost method.
 11 Q. Okay.
 12 A. If you look at the notes to the right, it has
 13 note number one. Go down to notes. It says, "TCM, total
 14 cost method."
 15 Q. Thank you. Down at the bottom?
 16 A. Yes, sir.
 17 Q. All right. So we've used total cost up to
 18 this point, and now we get to the adjustments under the
 19 adjusted total cost approach?
 20 A. Correct.
 21 Q. And among the -- let's see. This project
 22 lasted over -- well, between 500 and 600 days, correct?
 23 A. I'm not sure of --
 24 Q. Say fall of 2003 through June of 2005?
 25 A. Sure.

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1 Q. What efforts did you undertake to determine
 2 over that period of time which adjustments were
 3 appropriately charged to Hobson?
 4 A. The only adjustment -- negative adjustment we
 5 made was for removal of a stainless steel circular duct
 6 that was removed from the job site because it didn't meet
 7 the specifications.
 8 Other than that, we made no further
 9 adjustments.
 10 Q. You've used the term "we."
 11 What basis do you have for that pronoun?
 12 A. My firm.
 13 Q. Who made this determination?
 14 A. My firm, me essentially. I mean, it's -- I
 15 tend to, you know, not speak in the -- I say "we" as
 16 opposed to -- you know, it's --
 17 Q. I didn't know if you'd referred to -- are you
 18 referring to conversations you'd had with Hobson or its
 19 counsel?
 20 A. I have -- I would -- I would state that it --
 21 I've talked to Hobson and Hobson's counsel regarding
 22 self-inflicted wounds, and those -- that was the one that
 23 they came up with.
 24 I've gone through the -- my firm has gone
 25 through the -- some correspondence and so forth on the

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1 project and have not found any evidence that -- of any
 2 other defective work that was not per the specifications.
 3 So, in other words, we didn't find that they
 4 put in the wrong fan. We did not find that they put in the
 5 wrong size of ducts. We did not find that they did not put
 6 in the appropriate volume dampers or the types of things
 7 that you would expect.
 8 Had they have done any of those things, then
 9 they would have been -- those would have been charged
 10 against them as negative as well.
 11 Q. What was the basis for your analysis and
 12 conclusion that these were not -- that there were no other
 13 self-inflicted wounds, to use your term? How would you --
 14 A. We couldn't --
 15 Q. -- judge a particular event on the project to
 16 reach the conclusion that you reached?
 17 A. We looked for things, specific charges by the
 18 owner or engineer, that something that they did not -- that
 19 they did was not in compliance with the plans and
 20 specifications and was ultimately judged to be -- and that
 21 the architect, owner, engineer were ultimately judged to be
 22 correct in that.
 23 Q. Okay.
 24 MR. ANDERSON: Read that last answer back,
 25 please.

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1 (Reporter read as requested)
 2 MR. ANDERSON: Thank you.
 3
 4 BY-MR. ANDERSON: (Continuing)
 5 Q. What final adjudication are you referring to?
 6 A. Well, during the course of the project, if
 7 they would have issued, say, a unilateral change order that
 8 would have deducted money for something that they did that
 9 was not per the specifications, like say they put in the
 10 wrong pipe, and then they give you a -- a -- either an
 11 architect's order to remove it, then ultimately -- then
 12 ultimately that would be the -- the judgment that --
 13 because it would have been upheld.
 14 Now, there are a lot of times on projects
 15 where the owner will say, Well, I don't think that's right.
 16 And, in fact, the specifications that the -- the standard
 17 AIA-type specifications specifically give the contractor
 18 the right to appeal an owner's decision to an architect so
 19 that an architect can then -- so you would have the benefit
 20 of an architect's review of the plans if the architect
 21 says, No. That's what the plans and specifications say.
 22 The fact that there was a claim prior to that
 23 by the owner that something was wrong or a self-inflicted
 24 wound, it had been then subsequently adjudicated by the
 25 architect -- to use your term adjudicated -- judged by the

13 (Pages 46 to 49)

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1 architect to be in compliance with plans and
2 specifications.
3 We didn't find any of that. We didn't find
4 where the architect, during the course of the project,
5 ultimately rejected the work of Hobson.
6 Q. Okay. And that would be the information you
7 were looking for to determine what other adjustments might
8 be in order?
9 A. To determine what other self-inflicted wounds
10 there were, we were looking for things that would be
11 rejected by the architect, finally, at the end of the day,
12 you didn't do this right.
13 Q. How did you determine that the stainless steel
14 duct issue was worth \$3,657?
15 A. That number was given to me by Hobson. It
16 says, "Source" -- if you look at note number 2, "Source:
17 Hobson; total cost of \$3,180 plus 15% overhead in profit."
18 Q. Do you have that information in writing
19 somewhere?
20 A. I do not believe so. Well, I have it -- I
21 have it written by -- from Hobson, but I don't, you know,
22 have a -- I don't have it specifically segregated out.
23 Hobson gave me their -- compilation of
24 their -- what they thought. When I gave them mine, they
25 came back and gave me theirs. You can, you know, see this

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1 That's what they said it was worth. That's what their --
2 that's what they said their accounting system said.
3 I did not independently verify that they were
4 telling me the truth.
5 Q. Well, what would you have had to do to do
6 that?
7 A. Well, I don't know what I could have done to
8 specifically -- other than try and figure out what days
9 they installed the original several feet of duct. It
10 wasn't a heck of a lot of work. And then see who possibly
11 did it and see what the value of it was and then see when
12 they -- go to the day when they took it out and see how
13 many hours those guys put in.
14 Q. Okay.
15 A. It didn't seem like for \$3,000 it was worth
16 that much effort.
17 MR. LARKIN: Can we take a couple-minute
18 break?
19 MR. ANDERSON: Let me ask one more question
20
21 BY-MR. ANDERSON: (Continuing)
22 Q. What is your understanding of the stainless
23 steel duct issue?
24 A. My understanding of the stainless steel duct
25 issue was that it was -- didn't meet the specifications.

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1 Q. And what had happened at the job site as a
2 result of that?
3 A. They had to remove it.
4 Q. Now, they had to make it first, right?
5 A. (No response).
6 Q. Had to fabricate it?
7 A. Right.
8 Q. They had to buy it, correct?
9 A. Right.
10 Q. They had to buy the wrong steel? They had to
11 fabricate it in the shop, correct?
12 A. Correct.
13 Q. They had to transport it to the job site?
14 A. Uh-huh.
15 Q. They had to install it, correct?
16 A. Uh-huh.
17 Q. Ultimately, they had to take it out?
18 A. Correct.
19 Q. And then they had to do what? Buy new steel?
20 A. That would be in the contract.
21 Q. Okay.
22 A. So that wouldn't be additional.
23 Q. All right. So we stop there.
24 Now, we've got four or five steps that were
25 involved with this improper use of the wrong --

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1 A. Stainless steel duct.
2 Q. -- stainless steel duct, right.
3 What efforts did you take to determine -- I
4 guess, let me ask a general question.
5 How many feet of duct work were involved?
6 A. My understanding --
7 Q. Linear feet?
8 A. I'm not sure the exact number. My
9 understanding is that there was less than a pickup truck
10 load. It took one pickup truck to remove it.
11 Q. How did you get that understanding?
12 A. From Mr. Frisbee.
13 Q. Okay.
14 MR. LARKIN: Good time?
15 MR. ANDERSON: Sure.
16 (Pause in proceedings: 9:58-10:06 a.m.)
17
18 BY-MR. ANDERSON: (Continuing)
19 Q. So in terms of the total adjustments on this
20 project, you got a verbal report from Hobson that one
21 pickup load of wrong duct work or improper duct work had to
22 be removed from the project, wasn't a big deal, and they
23 gave you the value of \$3,657?
24 A. Yeah. I believe that came from their
25 accountant.

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1 Q. Okay.

2 A. You know, I'm not sure if it was one pickup
3 truck load or two, but basically it was not a substantial
4 amount.

5 Q. Were there any other issues on the project
6 that you became aware of, based on your review of the
7 materials, that jumped out at you as possible adjustments
8 that should be in Hobson's column?

9 A. The answer that question, given the -- my
10 prior testimony with respect to how you would judge those
11 is no.

12 Q. Okay. Now, your prior testimony was that if
13 they -- there was something done by Hobson that was
14 incorrect, an architect could have said to take it out or
15 an owner could have said to take it out, and you didn't
16 find anything along those lines?

17 MR. LARKIN: Objection. I think his testimony
18 involved a claim being submitted and a process under the
19 contract.

20 MR. ANDERSON: All right.

21
22 BY-MR. ANDERSON: (Continuing)

23 Q. You didn't find that type of formal approach
24 with respect to any particular claim involving some aspect
25 of Hobson's work on the project?

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1 work that you always do. That would be captured in the
2 bid.

3 I didn't find any real extraordinary cases
4 where, you know, Boy, we blew that floor. We've got to go
5 back.

6 I found this on other cases; for example, a
7 number of clients that do, you know, framing, for example,
8 where you would lay out a -- maybe they laid out the -- a
9 wall off of the wrong column line and had to come back and
10 pull that entire column or that entire thing out and put it
11 back in.

12 That's essentially what happened with the
13 stainless steel. They put in the wrong thing. They had to
14 come back in and take it back out. That was the only case
15 that I -- that I recall.

16 Q. Okay. How deeply did you delve into the
17 records to make sure that you were objectively reviewing
18 them to determine if there were other adjustments which
19 ought to be made?

20 A. Myself personally I would say not terribly
21 deep. I had a -- I had a -- our associate, Rob Fleskes,
22 who went through and highlighted -- he went through more
23 deeply than me into the specific records and highlighted
24 those things that I -- that he thought I needed to look at.

25 Q. Is there a list of those items?

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1 A. As being in noncompliance with the
2 specifications.

3 Q. Well, what about inefficiencies where maybe
4 something was done on the project that later had to go
5 back -- that Hobson had to go back and fix it?

6 MR. LARKIN: Objection; assumes facts not in
7 evidence.

8 Q. I'm just saying, did you see anything that --

9 A. Well, I think that on every construction
10 project, there is some inefficiency with respect to -- I
11 mean, there are punch lists, for example, and they had to
12 come back and do those. How much time did they spend doing
13 the punch lists? Was it extraordinary or not extraordinary
14 with respect to their estimating?

15 I mean, think about, these are guys that do
16 this for a living, everyday contractors, generally
17 speaking. They look at their past performance on those
18 projects.

19 A lot of those inefficiencies that are just
20 due to the nature of building are always -- are going to be
21 captured in their prior performance, and they base their --
22 their future estimates based on past prior performance.

23 So to the extent that minor inefficiencies of
24 just having to go back and, you know, fix some little thing
25 here or there is something that is in the nature of the

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1 A. I don't believe so, no.

2 Q. What do they consist of? You say he
3 highlighted things that he wanted you to look at?

4 A. I believe they're all in there.

5 Q. You think --

6 A. I believe they're either there or in here in
7 terms of the things that -- we didn't find a lot.

8 Q. Okay.

9 A. I don't think there's -- this is --

10 Q. Hold on. When you say they're either there or
11 in there, what's --

12 A. They're either in the notebooks in the box or
13 in this notebook, which is Exhibit 486.

14 Q. Okay. Where would they be -- let's start with
15 the box beside me.

16 What issues did your associate highlight for
17 you to review in terms of something possibly being an
18 adjustment that should be taken under your adjusted total
19 cost method?

20 A. I don't believe --

21 Q. Do you need the box to look at?

22 A. No. I don't believe that there are anything
23 else. I don't believe that --

24 Q. Well, you just told me that they're either
25 here or there.

15 (Pages 54 to 57)

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1 A. Well, no. You -- you've asked me two separate
2 questions. One is, What did he highlight? He highlighted
3 a lot of stuff.

4 The second question is, What of those things
5 that he highlighted pertains to this? And I've said it
6 was -- the only thing that he found was the stainless steel
7 duct.

8 Q. Okay. Let's just start with what he
9 highlighted. Tell me where I should look. I haven't had a
10 chance to look through your stuff.

11 A. We would just go through it page by page if
12 you'd like and see what's highlighted and what's not.

13 Q. Okay. I'll just hand you the box, then.

14 A. For example, he went through and highlighted
15 these sections, 14.4, termination for convenience. He
16 highlighted those things for me to look at.

17 Q. Would all of the highlighting be your
18 associate's?

19 A. It's either his or mine. I mean, I can't
20 break them out and say, This one is his and this one is
21 mine.

22 These are questions that we looked at.

23 There's specific issues we had questions about with respect
24 to the REA.

25 Q. Are they typewritten questions?

1 A. Well, some of them are just -- no. They're
2 just stuff that's written on the side.

3 Q. Uh-huh.

4 A. This is specification stuff we reviewed. This
5 is included in the REA that is now out. Obviously, these
6 are all -- this is equipment T and M sheet.

7 Q. Why don't we -- let me back you off just a
8 little bit. What I was referring to would be a review of
9 the records from the job itself.

10 Is that what's contained in the notebook we've
11 marked as 486?

12 A. Are you asking -- are you asking me if there
13 is a written review of the record?

14 Q. No, no. I'm asking you, of the records from
15 the job, how do we know which ones your associate looked at
16 and highlighted as possible adjustments?

17 A. Well, they would be the ones that would be
18 highlighted --

19 Q. And --

20 A. -- to the extent they're either highlighted by
21 him or highlighted by me.

22 To the extent you're asking how do we know
23 which ones we reviewed specifically, I don't think we have
24 a way of pointing to it saying, This was, this was not.

25 Q. We can group them in a room. Tell me where

1 these highlights are that you'd --

2 A. I'd just have to go through them and point
3 them out to you. I don't know exactly where every one is

4 Q. Do we have everything that you would have
5 looked at and highlighted --

6 A. In this room?

7 Q. Yes.

8 A. I believe so, yes.

9 Q. Not in the back room?

10 A. No.

11 Q. Anything that was highlighted would have been
12 brought into the notebooks that you have today?

13 A. That's correct.

14 Q. In this room?

15 A. I believe that is correct, yes, sir.

16 Q. Okay. Okay.

17 A. Do you want to keep going?

18 Q. Yeah.

19 A. Okay.

20 Q. Let's just find one.

21 A. Well, we just found a couple of them. I mean,
22 obviously, all of these things we need to go through.

23 Here's a -- here are some highlights on questions with
24 respect to, you know, what does this mean?

25 Q. Did you review any correspondence from the

1 architect or mechanical engineer?

2 A. Yes. I don't remember specifically what I
3 reviewed, to be honest with you. I mean, I know there was
4 several things back and forth, but I couldn't tell you
5 chapter and verse.

6 Q. Do we know where those are that you actually
7 reviewed?

8 A. I --

9 Q. Do you have those isolated in some fashion?

10 A. I don't have them isolated, no.

11 Q. Where would they be that you did review?

12 A. They should be in all the documents contained
13 in this book or in here.

14 Q. So in the --

15 A. In the box right there or in this box.

16 Q. In the --

17 A. 486.

18 Q. Okay.

19 A. I believe we should have a correspondence
20 file. If it -- if for some reason I did not bring that
21 correspondence notebook up, I can't imagine why it's not in
22 here.

23 Q. Okay. Take a look and see if it is. If we
24 need to get it, that's fine.

25 A. This isn't all the stuff that I delivered

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1 because I had two notebooks sitting up on top.
 2 Did they all get put in? I know I had --
 3 MR. LARKIN: I'm not sure if they got
 4 consolidated.
 5 THE WITNESS: Did somebody consolidate these?
 6 There's mediation statements, a bunch of attorney stuff,
 7 depositions.
 8 These are all -- did they make copies of
 9 these.
 10 MR. LARKIN: I think so.
 11 THE WITNESS: Okay. Are these copies for
 12 them? Is that why these are made?
 13 MR. LARKIN: I believe so.
 14 THE WITNESS: Yeah. To the extent that there
 15 was anything highlighted on those, they would not show up
 16 anyway.
 17
 18 BY-MR. ANDERSON: (Continuing)
 19 Q. Do you understand where I'm trying to go here?
 20 A. You're trying to -- I assume what you're
 21 trying to get at is that you -- you're questioning how much
 22 stuff we looked at that was adverse to our client.
 23 Q. Pretty well put.
 24 A. Yeah.
 25 Q. And you --

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1 A. All I can tell you is that we believe that
 2 through our discussions and what we looked at, we didn't
 3 find a whole heck of a lot.
 4 Q. And my job is to find out exactly what you
 5 looked at.
 6 A. If that's the way that you characterize your
 7 job, I guess. I mean, I'm not going to tell you what your
 8 job is.
 9 MR. LARKIN: He's already testified that --
 10 Q. I'm asking you --
 11 MR. LARKIN: -- he looked at production
 12 notebooks, which there have been a lot of. And there are
 13 some documents segregated after that review that I think
 14 he's pointing to.
 15 Is your question what specific documents did
 16 he look at of the world of documents?
 17 MR. ANDERSON: Yeah, what's the universe?
 18 MR. LARKIN: That he reviewed.
 19 If you know, you can testify. If you don't
 20 know, it's --
 21 THE WITNESS: Yeah. You know, I -- I can't
 22 point to all the specific things that we looked at.
 23 Again, these now are copies, and so the
 24 highlights that were on them wouldn't be there.
 25

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1 BY-MR. ANDERSON: (Continuing)
 2 Q. Of the depositions?
 3 A. Both -- it's not just depositions that are in
 4 here. This -- this -- this is a compilation of several
 5 notebooks that are -- or a couple of notebooks that we had
 6 put together.
 7 Q. And on the binder, I think there's a list.
 8 A. Yeah. It includes contracts, mediation
 9 statements, issues, scheduled delay, deposition
 10 transcripts. I don't see any correspondence, though.
 11 There are also correspondence, I would note,
 12 in the request for equitable adjustment.
 13 Q. And that would be -- well, let me ask you
 14 again: Would the universe of documents that you looked at,
 15 in terms of trying to determine which adjustments ought to
 16 be taken against the total claimed by Hobson, be in the
 17 binders that you produced here in the room?
 18 MR. LARKIN: Object to form.
 19 A. I would -- my initial -- my answer to that
 20 question was, I believe that is true.
 21 Q. Okay.
 22 A. I do not see some of the stuff that I thought
 23 that I had brought up yesterday.
 24 Q. What do you think is missing?
 25 A. Well, I don't see something that just says

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1 correspondence.
 2 Q. All right. Do you need to go look for that?
 3 A. Well, I --
 4 Q. I want to make sure that we fairly have an
 5 idea of what you looked at.
 6 A. If you want, I can go downstairs and take a
 7 look and see, you know, what the -- the other binders we've
 8 got.
 9 MR. LARKIN: Want to go off the record?
 10 MR. ANDERSON: Yes.
 11 MR. LARKIN: Let's go off the record.
 12 (Pause in proceedings: 10:21-10:26 a.m.)
 13
 14 BY-MR. ANDERSON: (Continuing)
 15 Q. Let's go to the next entry. You have Time
 16 Extension Costs near the middle of Exhibit 485. It says,
 17 "Extended Plant Costs: 375 days times 119.58 per calendar
 18 day."
 19 Did I read that correctly?
 20 A. That is correct.
 21 Q. Where did you get that figure from?
 22 A. The 119, that is --
 23 Q. You say, "See Hobson worksheet." Which
 24 worksheet are you referring to?
 25 A. Extended plant worksheet in the back here, job

17 (Pages 62 to 65)

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1 trailer, heliarc welder, gang box and tools, T-Mobile
2 phone, vehicle, total: 119.58.

3 Q. Did you compare those rates to that which was
4 allowed by the contract for field office overhead?

5 A. I don't think that there's anything in the
6 contract that says that you're allowed \$40 for a trailer.

7 Q. Okay. So in answer to my question, did you
8 look to see what is allowed per the contract?

9 A. Yes. I think that the contract specifically
10 says things that are not allowed as opposed to things that
11 are allowed, though.

12 Q. Look at 4.3.5.1 of the supplemental
13 conditions.

14 A. Could you give me a copy of it or let me look
15 at it?

16 Q. Sure. There's various entries dealing with
17 actual labor costs, things of -- you see the four entries
18 down at the bottom there?

19 A. "Number one, actual labor costs, fringe
20 benefits, employment taxes, insurance related to product
21 superintendent" -- "related to the project superintendent;
22 two, the costs associated with fair rental value of the
23 project superintendent's vehicle directly related to the
24 time extension; three, direct cost attributable to the
25 extension for the field office facility, including

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1 telephone lines, utility lines, power lines, water and
2 sewer, (toilet)."

3 "Mark-up on these costs will not be allowed.
4 The contractor shall make all reasonable efforts to
5 prevent/mitigate these effects of any delay regardless of
6 cost."

7 Q. Is this the first time you've ever read that?

8 A. No. I don't recall specifically when I would
9 have read it before, but I'm sure I've looked at it.

10 Q. Okay. And do you believe your adjusted total
11 cost approach comports with that portion of the contract?

12 MR. LARKIN: Just so I understand the context,
13 you're asking him to give you a response with respect to
14 entitlement?

15 MR. ANDERSON: No. I'm not asking him about
16 entitlement. I'm asking him about the basis for his
17 entries here.

18 MR. LARKIN: Based on the contract language?

19 THE WITNESS: Those items, job trailer,
20 heliarc welder, gangbox and tools, T-Mobile, all fall
21 within the items that I've just read for the extended plant
22 costs.

23 MR. ANDERSON: No. I'm not asking him to
24 interpret the contract for us, as you well know. I'm just
25 asking him what background he actually engaged in in terms

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1 of trying to familiarize himself with the project.

2 MR. LARKIN: We'll sort that out later.

4 BY-MR. ANDERSON: (Continuing)

5 Q. So in your analysis, you have 375 days.

6 Where did that come from?

7 A. That's the difference between the original
8 contract time and the amount of time that was spent out on
9 the job.

10 Q. Okay. And you did not perform the scheduled
11 analysis, did you?

12 A. No, I did not.

13 Q. What is the start date and end date of that
14 period? Maybe that's what you just answered.

15 A. Yeah. I don't recall the specific day, start
16 and stop. I mean, I just -- I -- we did the calculation.
17 That's the number that we came up with.

18 Q. Okay. And then that bid the original
19 completion date versus the date -- an up to the termination
20 for convenience date?

21 A. Well, at least the date that they stopped
22 getting -- yeah. I would say yes, that would be the
23 answer.

24 I'm not sure if there was a day or two after
25 the actual termination that -- that, you know, would be

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1 included.

2 Q. And did that seem to be an appropriate period
3 of time to calculate extended plant costs?

4 A. It was the extended time, so yes.

5 Q. Okay. Now, you say, "Extended Reach Forklift,
6 \$48,390." Note 5 says, "See Hobson back-up, based on
7 billing to Micron."

8 What backup do you have?

9 A. This right here is a -- this is what they --
10 they used to justify \$3,456.49 per month, which is what
11 they charged another vendor during the same time for -- or
12 same -- not same specific time, but in 2004 for this piece
13 of equipment that they had out on the job during this
14 extended period, which is not part of -- it was not
15 directly costed to their -- was not directly costed to the
16 job cost.

17 Q. Why not? Wouldn't that be a cost to the job
18 if you had a piece of equipment there?

19 A. Well, again, as I explained before, this
20 contractor, like a lot of contractors, don't specifically
21 put equipment in their -- in their job costs.

22 What they do, which is relatively common, is
23 they take their overall plant -- or equipment and plant
24 costs generally at the end of the year and then figure out
25 how much percentage markup that would be on average for all

18 (Pages 66 to 69)

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1 projects and then they go forward from that.
 2 You know, so -- and that's not an uncommon way
 3 for particularly small contractors to operate. They just
 4 look at the end of the year. Well, how much did we spend
 5 on all of our equipment?

6 Say it's 3 percent of our total cost of -- our
 7 total revenues. So next year, we're going to estimate
 8 based on using 3 percent.

9 Q. What evidence do you have that this forklift
 10 was required to be on the job for 14 months?

11 A. I don't have any.

12 Q. What evidence do you have that this forklift
 13 was on the job for 14 months?

14 A. Only the testimony of the -- of the --
 15 Mr. Frisbee and -- and Hobson.

16 Q. Okay. You wouldn't -- well, did you analyze
 17 this particular element of the claim to determine whether
 18 or not it had any legitimacy?

19 A. Well, I --

20 Q. In other words, was it necessary?

21 MR. LARKIN: Object to form.

22 A. I did not, and I also didn't analyze whether
 23 or not he was lying.

24 Q. Next entry is project manager.

25 A. Correct. In the REA, there was a certified

1 amount of 575 hours that was specifically during a shutdown
 2 period where the project was put on suspension.

3 Mr. Frisbee certified in the REA that he spent
 4 that time, which is not a job cost because he's not in the
 5 job cost, and that -- at that rate.

6 Q. Okay. Which charge are you referring to?

7 A. Pardon me?

8 Q. What part of the REA are you referring to?

9 A. I'm trying to find where --

10 Q. You say during the stop work order?

11 A. Yes. So from May 28th to -- well, I guess --
 12 okay. So May 28th to 12/25/04 -- actually, all the way
 13 through to July '04.

14 So starting in the stop work and then
 15 throughout, I guess, the rest of the -- the job they had
 16 certified 575 hours.

17 Q. Okay.

18 A. So that certification, since it was certified
 19 and sworn to, I didn't question the legitimacy of it.

20 Q. Wouldn't that be a home office overhead item?

21 A. No, because my understanding from talking to
 22 them is that he left his home office overhead kind of
 23 position of managing the company to be specifically
 24 managed -- working on this specific job.

25 This is a small job with respect to their

1 overall revenues. I think it was 5 percent or something --
 2 not 5 percent, \$600,000 of \$12 million during the period.

3 So, you know, as the guy who runs the company,
 4 he expected to spend not a whole heck of a lot of time on
 5 this project.

6 And as a consequence of the problems that were
 7 occurring out on the job, specifically Hobson maintains it
 8 has to do with design, that he had to spend all these hours
 9 that were over and above his home office overhead position,
 10 and that's why they claimed it.

11 Q. Okay. What's the -- go back to the 575-hour
 12 document and give me the Bates number, if you could.

13 A. I don't know that there is one. I don't have
 14 one with a Bates number. I don't know why that is.

15 Q. What's the heading in your notebook?

16 A. "Hours, Bio Safety Level 3 Lab, C964 -- or 94,
 17 Ted Frisbee, Senior."

18 Q. Okay. Next entry is welder's differential
 19 during stoppage, footnote 7.

20 What are you referring to there?

21 A. They made a -- they hired a number of welders.
 22 And this is also certified, I believe. What's the welder
 23 cost?

24 They had a number of guys out on the job,
 25 Karen Smith Dontae or -- Dansley or Danley and Fife.

1 These guys were out on the job and they had --
 2 they were certified welders. They got them certified.
 3 They then held them through the period of time that they
 4 were -- during the -- during the shut-down period on -- put
 5 them on other work that was not welder work, but apprentice
 6 work. And so the value that they got out of those guys was
 7 substantially less than a welder.

8 As a business decision, they decided to hold
 9 on to those guys because they were afraid they were going
 10 to lose them.

11 Q. Who told you that?

12 A. Mr. Frisbee and Mr. Mullen.

13 Q. Okay.

14 A. Now --

15 Q. Have you looked at their time books?

16 A. They've made those available to me here.

17 Q. Well, that's not my question.

18 A. I have not, no. I requested them.

19 Q. Where are they?

20 A. I --

21 Q. Do you have them here?

22 A. No.

23 Q. The time books?

24 A. The only thing I have is the printout. I
 25 don't have their daily time cards.

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1 THE WITNESS: I assume they're probably in
2 your office, right? I haven't looked at those.

3 Q. So you haven't reviewed the time books of
4 these welders to see what they were doing?

5 A. No, sir.

6 Q. Do you know what they were being charged at?
7 You say they were doing apprentice work.
8 Do you know what --

9 A. I do not.

10 Q. -- that work was?

11 A. No, I don't.

12 Q. Okay.

13 A. In fact, I just received this document
14 yesterday. I'm afraid that there will need to be an
15 adjustment made to that total based on this document.

16 Q. In what way?

17 A. It appears that they spent less so that that
18 number would go down.

19 Q. What number do you have there?

20 A. Well, this number says \$25,759.04.

21 Q. Okay. And that would be some sort of
22 differential. You call it a welder's differential. What
23 two figures are we talking about?

24 A. Well, again, I was given by those -- by Hobson
25 this billing rate sheet originally to calculate this, and

1 A. I don't believe you're wrong, correct.

2 Q. All right. Next entry, "Past Through Claims
3 by Subs." I think we've looked at those.

4 Roughly, you think there's going to be some
5 future adjustment there, if there's some home office
6 overhead that's not allowed?

7 A. To the extent, yeah, that you pointed those
8 out, yeah, I agree with you. Those adjustments need to be
9 made.

10 Q. Okay. Now, we've got the total of
11 adjustments, and then there's a fee on the adjustments of
12 15 percent.

13 Again, why is that allowed?

14 A. You know, in looking at -- frankly, if you
15 look at this thing a couple different ways, that probably
16 shouldn't be on there.

17 One is that we subtracted the fee on the one
18 up above. But some of these items, like the project
19 manager, for example, probably -- might be subject to 15
20 percent.

21 But looking back at the specification that I
22 read into the transcript -- or into the -- for the
23 deposition, I believe it says that the overhead and profit
24 on those extension costs under the time extension wouldn't
25 be allowed. So it should be reduced out of that.

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1 that has the difference between what they paid for
2 apprentice and what they paid for journeymen.

3 The differential between those two -- and
4 essentially this is -- this is what they are -- this is the
5 value of the work that they did, right, because that's what
6 they charge.

7 So the difference between those two numbers
8 is -- 37.33 and 15.58 is roughly \$21 an hour multiplied by
9 the hours that I was supplied, which is 1,440, to come up
10 with the 3135.

11 My -- yesterday afternoon, I received -- I
12 asked for and received the actual amount. That's different
13 than this, which -- obviously, since this premium number is
14 greater than the amount that apparently they were paid.
15 So, as a consequence, that number will have to be reduced.

16 Q. Okay. What do you think it will be reduced
17 to?

18 A. Well, it looks like it's going to be reduced
19 probably down to about 10 grand.

20 Q. Okay. And that would be on the assumption
21 that the work they were doing was all apprentice work as
22 opposed to journeymen welder work?

23 A. That is --

24 MR. LARKIN: Object to form.

25 Q. Am I wrong in that?

1 In terms of the claims, the pass-through
2 claims by the subs, to the extent that they applied 15
3 percent to their original contract amount, the adjusted
4 amount should be reflected there, also, plus 15 percent.

5 I mean, the contractor should get a fee on his
6 subcontractors if they had to do more work, which is what
7 they're claiming.

8 Q. Okay. So you --

9 A. So it appears there needs to be an adjustment
10 there, too, which is why I said originally that maybe
11 semifinal was probably a better heading rather than final
12 damages calculation.

13 Q. Okay. So it was your intention to have a
14 final damage calculation, but we might have some additional
15 work to do?

16 A. Yeah. It's always my intention to make things
17 final. I don't like to go back and redo them, but, you
18 know, things change.

19 Q. All right. Let's go back to the Noncontract
20 Work Damages Calculation.

21 A. Uh-huh.

22 Q. It looks like there's interest, 836 days at 12
23 percent. We've got a footnote of, "Based on 12% simple
24 interest beginning June 3, 2005."

25 What are you -- what sum are you applying the

20 (Pages 74 to 77)

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1 12 percent to?

2 A. On the ATCM, which is from the previous page,

3 the total of the 490. So obviously that's going to change.

4 Q. So you're saying that if the \$490,553.08 is

5 the amount that's showed to Hobson, then they would be

6 entitled to 12 percent from the date of termination for

7 convenience?

8 A. That's my understanding, yes.

9 Q. Okay. And --

10 A. Simple interest based on -- so how we

11 calculated that was 12 percent simple interest divided by

12 365 days per year, multiplied by 836 comes up for a total

13 premium of 27.45.

14 Q. Are you familiar with the term prejudgment

15 interest?

16 A. Prejudgment interest? I'm familiar with the

17 term. You know, I couldn't tell you what the legal meaning

18 is specifically.

19 Q. Are you saying that up until the time that a

20 judgment is entered in this case, they ought to be --

21 Hobson ought to be entitled to 12 percent on the amount

22 that's owing as of the termination of the project?

23 A. That's what this says, yes.

24 Q. And do you believe that it is readily

25 ascertainable that \$490,553.08 was owing to Hobson or

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1 perhaps would there have to be some adjustments to that

2 figure?

3 A. Well, we know there have to be some

4 adjustments. We've already discussed that.

5 Q. Okay. Thanks.

6 Now, let's go to, "Claim Paid to SEZ." What's

7 that refer to?

8 A. That was in the REA, and it's apparently -- I

9 have not investigated that independently. It's apparently

10 a claim that Hobson paid to SE/Z, an amount that they paid.

11 Q. And you don't know for what reason?

12 A. I believe it was part of the -- it was costs

13 incurred for the REA production, this REA that -- that they

14 originally came up with.

15 Q. Okay. The outside accounting consultant, do

16 you know who that was --

17 A. No.

18 Q. -- or is?

19 A. No, I do not. That came from -- if you look

20 at -- all of those are footnoted or noted to -- it says

21 amount of -- wow. My numbering is off here, by the way,

22 for some reason. Sorry about that.

23 Q. Okay. I have to ask you one more question.

24 Under Adjustments on the first page, do you

25 have any documentation from Hobson that would support the

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1 365 -- \$3,657 for the stainless steel duct issue?

2 A. As I testified before, all I have is what they

3 wrote and sent to me.

4 Q. Okay. Just a number that somebody supplied?

5 A. Correct, correct.

6 Q. All right. Have you asked for any backup to

7 say, Gee, give me your shop records to see how much duct

8 work was actually involved or, Give me your labor records

9 to show who was actually involved? Anything like that?

10 A. Yes, I did.

11 Q. And did you get anything?

12 A. No.

13 Q. When did you ask?

14 A. I've asked a couple of times. Originally, I

15 asked back in, you know, like August.

16 Q. All right. Because you thought that would be

17 important information to have?

18 A. I just want to have all of the backup, sure.

19 Q. Okay. What has been the response?

20 A. I got a number, 3160, and I applied 15 percent

21 to it.

22 Q. Have you --

23 A. I don't know that -- I think the thing is is

24 that they -- they felt that it -- it was really hard to

25 figure out other than the numbers that they had in their

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1 accounting system.

2 Q. They told you they thought it would be hard to

3 figure out? Is that what you just said?

4 MR. HAHN: Object to form.

5 A. I said I think that they probably felt it was

6 hard to figure it out. I don't know.

7 Q. Okay.

8 A. All I can tell you is I haven't got it.

9 Q. All right. Next we've got some attorneys'

10 fees, Jones Gledhill. Then you've got two entries for --

11 one for Randy Frisbee and one for Ted Frisbee.

12 Would that be for claim preparation work or

13 what -- what are those hours for at a different rate than

14 you have for Mr. Frisbee as a project manager?

15 Do you know why that rate is different? I

16 guess to ask a compound question, do you know what those

17 hours involved?

18 A. No, I do not.

19 Q. All right. So these are just numbers people

20 gave you, and you put them on your piece of paper?

21 A. They are noncontract. I believe it says that

22 we have no -- we have not independently confirmed any of

23 this. This was included in their claim.

24 Q. You're not taking any responsibility for those

25 numbers?

21 (Pages 78 to 81)

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1 A. Nope.
 2 Q. Then we have estimated fee to Stewart, Sokol &
 3 Gray of 5,000 --
 4 A. \$550,000.
 5 Q. \$550,000. I'm a defense lawyer. I don't deal
 6 in these big amounts for attorneys' fees, so --
 7 MR. LARKIN: Move to strike.
 8 Q. That would be one third of the total cost and
 9 non -- total cost of contracted and noncontract work claims
 10 down at the bottom?
 11 A. Yeah. I would say it's actually greater than
 12 that. It's -- you said a third. A third would -- if it
 13 were a third, that would be 16 -- or 1.65, wouldn't it, or
 14 1. -- yeah, 1.650.
 15 Q. Okay. Do you understand that there's a
 16 contingent fee arrangement?
 17 A. I did not understand that until recently. But
 18 I understand that that is the case, yes.
 19 Q. Okay. So there have been no attorneys' fees
 20 paid?
 21 MR. LARKIN: Object to form.
 22 A. I know that there's an accounting of some
 23 costs that have been paid to Stewart, Sokol & Gray. I
 24 don't know what they're for.
 25 Q. Okay. But that wasn't my question, because I

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1 distinguished between costs and fees.
 2 Are you aware of any fees that have been paid?
 3 MR. LARKIN: Objection.
 4 A. I'm not aware of any fees that have been paid.
 5 MR. ANDERSON: What's the basis for
 6 the objection?
 7 MR. LARKIN: The fees have been accrued, but
 8 he doesn't have any -- you've asked him the question. He's
 9 responded.
 10 MR. ANDERSON: Okay.
 11 BY-MR. ANDERSON: (Continuing)
 12 Q. Do you understand what he means "the fees have
 13 been accrued"? Sounds like an accounting term.
 14 Have they shared this with you?
 15 A. Mr. Larkin has given me -- came up with the
 16 estimate. He's the one that gave me the number 550,000.
 17 Q. Has he shared any documents with you in terms
 18 of the contingent fee arrangement?
 19 A. Nope.
 20 Q. Have you asked for it?
 21 A. Nope.
 22 Q. Finally, we have the consulting fee from your
 23 company. You say it's estimated, but I think in your
 24 notebook you said you have some invoices?

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1 A. Yeah. I've got invoices to date, but -- I
 2 mean, this is estimated through trial.
 3 I believe both -- maybe I should clarify this.
 4 I believe that your estimate also includes through trial.
 5 Mine includes through trial.
 6 Q. All right. Under note 6 you say that your
 7 company takes no position on legal application of these
 8 fees or these -- these noncontract damages; is that
 9 correct?
 10 A. Yeah. We're not lawyers. The judge is going
 11 to --
 12 Q. Your role in this case is simply to take costs
 13 that you've been given and work up an analysis of those
 14 costs?
 15 A. I think you already asked that question once,
 16 and I think I answered by saying that I would hope that's
 17 not the entirety of what we've done here.
 18 But to the extent a lot is math and
 19 accounting, as far as these things are concerned, they --
 20 I -- you are entirely correct.
 21 Q. Okay.
 22 MR. LARKIN: You mean "these" meaning the --
 23 THE WITNESS: The noncontract work damage
 24 claims.
 25

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1 BY-MR. ANDERSON: (Continuing)
 2 Q. Right. I'm just trying to get a picture of
 3 the scope of your work.
 4 A. No, I understand.
 5 Q. You've been asked to look at a variety of
 6 materials and come up with a method of analyzing the costs,
 7 which Hobson should be entitled to under your analysis; is
 8 that correct?
 9 A. Well, I think I testified that we were
 10 originally asked to look at the damages under the REA and
 11 to independently evaluate them.
 12 We went through the REA for reasons which --
 13 you know, we had a lot of reasons. We were unable to
 14 reconcile those with the accounting system with respect to
 15 all these specific individual claims. And so then we just
 16 took the accounting system and applied an adjusted total
 17 cost method based on that.
 18 We reviewed a lot of stuff. You know, in
 19 terms of specific entitlement issues under each one of
 20 those, at the end of the day, that -- while those seemed
 21 like good arguments and they had backup, at the end of the
 22 day, they're irrelevant to the calculations that we made.
 23 Q. All right. And in terms of the calculations
 24 you made, you have taken data from the records. You've
 25 looked at the costs that are associated with that data and

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1 come up with the analysis that you provided in Exhibit 485?
 2 A. That is correct.
 3 Q. All right. I just wanted to make sure that
 4 was the total scope of your work.
 5 A. Yes.
 6 Q. All right. I don't want to expand the total
 7 scope of your work in any way.
 8 You understand that?
 9 A. I --
 10 MR. LARKIN: Except to the extent he's
 11 testified to today and responded appropriately to
 12 questions.
 13 MR. ANDERSON: No. I don't think he gets to
 14 testify about entitlement.
 15 MR. LARKIN: We'll take that up separately.
 16 MR. ANDERSON: One second.
 17 That's all I have for right now. I'm going to
 18 reserve the right to come back once I get a chance to
 19 review your materials.
 20 THE WITNESS: Sure.
 21 MR. ANDERSON: We'll go from there.
 22 THE WITNESS: I'm going to take this with me.
 23 You can take those -- those are copies, but this is an
 24 original, and I -- I can give you an electronic copy of my
 25 dissertation if you really want to read it.

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1 MR. ANDERSON: Not right now, but I appreciate
 2 it.
 3
 4 EXAMINATION
 5 BY-MR. CHOU:
 6 Q. Mr. Williams, good morning. My name is Jeremy
 7 Chou. I represent the State in this matter. Thank you
 8 very much for being here. I just have some follow-up
 9 questions that I need to ask you. You used the phrase
 10 "self-inflicted wounds."
 11 Can you explain to me what that means to you?
 12 A. Well, it's, I guess, a colloquialism that we
 13 use a lot to mean that those things that a contractor is
 14 responsible for that essentially they did wrong that you
 15 need to take off, subtract from the total cost or adjust
 16 from the total cost method.
 17 Q. What's included in that, for example?
 18 A. In general?
 19 MR. LARKIN: In this case.
 20 Q. In this case.
 21 A. I think I gave the example on the record
 22 earlier of -- of a framer that maybe put a wall in the
 23 wrong location and had to come back and remove the wall and
 24 rebuild it in the proper location, things -- or in this
 25 case it happens to be that they put the wrong duct in, type

1 of duct in in one place, and they had to come remove that.
 2 Those are --
 3 Q. I think you said not following specs?
 4 A. Correct, yeah.
 5 Q. Is that --
 6 A. But, you know, not following the
 7 specifications doesn't entirely cover everything. I mean,
 8 putting a wall in the wrong location is not necessarily a
 9 specification issue. It happens to be where the plans are.
 10 There are other types of self-inflicted
 11 wounds, you know, as well. You know, did the -- in your
 12 opinion, did they have the wrong management out there? Did
 13 they -- you know, something --
 14 Q. Would poor workmanship be included in that?
 15 A. Yeah. If they had a higher-than-average
 16 rejection rate of -- of say an inspector, you know, had a
 17 significantly higher than normal rejection rate of, say,
 18 putting screws in or something in walls for drywall, for
 19 example.
 20 Q. Okay. You testified that you saw a lot of
 21 materials.
 22 My question is, did you happen to take a look
 23 at the documents that had to do with the rebuild of the
 24 project?
 25 A. The rebuild of the project?

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1 Q. Right.
 2 A. What specifically are you referring to?
 3 Q. Were you aware that we're rebuilding the
 4 project?
 5 A. No.
 6 Q. So you haven't seen any documents related to
 7 that?
 8 A. No, sir.
 9 Q. Okay. There was a line of testimony that had
 10 to do with adjustments. You were going to make an
 11 adjustment for the welder's differential?
 12 A. Correct.
 13 Q. You're going to make an adjustment for RM
 14 Mechanical?
 15 A. Correct.
 16 Q. You're going to make an adjustment for ATS?
 17 A. Correct.
 18 Q. You're going to make an adjustment for Ro-Bar
 19 Technical?
 20 A. Correct.
 21 MR. LARKIN: And that's subject -- I think he
 22 testified that's subject to confirming there's extended
 23 home office in those claims.
 24 Q. Was there --
 25 A. I believe -- and I believe that we've

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1 confirmed that.

2 Q. Was there anything to prevent that
3 confirmation before today?

4 A. Anything that prevented?

5 Q. Prevented you from looking at those numbers
6 and confirming the numbers before today.

7 A. It was just a slip.

8 Q. Okay. And you're going to make an adjustment
9 for the interest --

10 A. Let me -- let me go back a couple of steps
11 beyond to really further answer your question.

12 It only became aware -- I only became aware of
13 the Court's ruling on the Eichley damages last Friday. And
14 so, you know, I didn't spend that much time. I've been --
15 I was in Las Vegas on Monday and Tuesday at a conference
16 and, you know, as a consequence, I mean, I didn't make
17 those adjustments. It was a slip.

18 Q. So you're going to be --

19 A. I will make them.

20 Q. You'll provide us a final?

21 A. An updated -- I should date it.

22 Q. Updated final?

23 MR. LARKIN: We will provide you an updated
24 version.

25 MR. ANDERSON: Good idea. Can you date that?

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1 MR. CHOU: I'll reserve the rest of the
2 questions.

3 MR. LARKIN: Let's go off the record.

4 MR. HAHN: No questions.

5 (Deposition adjourned at 10:57 a.m.)
6
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1 STATE OF OREGON)

2) ss

3 COUNTY OF MULTNOMAH)
4

5 I, Heather M. Ingram, Certified Shorthand Reporter for
6 the State of Oregon, do hereby certify that GERALD H.
7 WILLIAMS, JR., PhD, PE, personally appeared before me at
8 the time and place mentioned in the caption herein; that
9 the witness was by me first duly sworn under oath and
10 examined upon oral interrogatories propounded by counsel;
11 that said examination, together with the testimony of said
12 witness, was taken down by me in stenotype and thereafter
13 reduced to typewriting; and, that the foregoing transcript,
14 pages 1 through 90, both inclusive, constitutes a full,
15 true and accurate record of said examination of and
16 testimony by said witness, and of all other oral
17 proceedings had during the taking of said deposition, and
18 of the whole thereof.

19 Witness my hand at Portland, Oregon, this 26th day of
20 November, 2007.
21
22

23

24

25

Heather M. Ingram

Certified Shorthand Reporter

EXHIBIT E

01467

DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF ADA

- - - - - x Case No. CVOC0508037
:
HOBSON FABRICATING CORP., an Idaho
corporation, :
:
Plaintiff, :
:
vs. :
:
SE/Z CONSTRUCTION, LLC, an Idaho :
limited liability company; and STATE :
OF IDAHO, acting by and through its :
Department of Administration, :
Division of Public Works, :
:
Defendants. :
:
- - - - - x
:
and related matters. :
:
- - - - - x

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Motion hearing on March 24, 2010, before
Ronald J. Wilper, District Court Judge.

Reported by
Dianne E. Cromwell
CSR No. 21

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BOISE, IDAHO
 March 24, 2010, 2:54 p.m.

THE COURT: Folks, we'll go on the record in the case of Hobson versus SE/Z, for short.

This is the time scheduled for a hearing on several motions. Now, we have Mr. Oberrecht representing the state, along with Mr. Stefanic.

MR. STEFANIC: Yeah, representing Rudeen, Your Honor.

THE COURT: Where is Mr. Anderson today?

MR. STEFANIC: He is out of the city.

THE COURT: And so, Mr. Stephanic, you'll be representing Mr. Anderson's client, Rudeen & Associates today. Thank you.

And Mr. Hahn representing SE/Z.

MR. HAHN: Yes, Your Honor.

THE COURT: And Mr. Henry?

MR. HENRY: Mr. Henry, Your Honor.

THE COURT: Thank you. And you're representing Hobson.

Folks, we're here today on several pretrial motions. I think that the way I would like to approach it is this way: Mr. Oberrecht,

when you and the court received the motions filed by Mr. Henry, and they were scheduled -- I think they were noticed to be heard sometime prior to today -- you had contacted the court and counsel for all parties to make an objection to the propriety of filing four motions in limine, three of which at least you characterized as really disguised substantive motions for summary judgment or for partial summary judgment, and then a substantive objection to the fourth motion in limine.

And you objected to the separate motion to dismiss Rudeen, your claim against Rudeen, and you convened a telephone conference that was off the record but did include all of the various parties and the court.

At that point, Mr. Henry, I believe that you objected to the procedure to hearing Mr. Oberrecht's objection on such an informal basis. You wanted an opportunity to argue about the propriety of filing such motions at this time and then to get to the substance of the motions as well.

And I agreed with you, that because of the long history of this case and the complexity

both technically and procedurally of this case, it would be better to have this hearing on the record with all parties present.

Now, I think that the first thing we should remember is this: At the end of the trial on about October 28, 2008, the court declared a mistrial really for no other reason than everybody had agreed that the trial would last three weeks or so. We had a jury impaneled and told the jury that we would need them for about three weeks.

Two weeks into the trial, it became apparent that the trial would not be finished in three weeks, it would be more like seven weeks or eight weeks before the trial was over. That's what caused the mistrial.

I had a first degree murder trial starting the next week. The jurors were advised that we needed them for three weeks or so, and there was just no way that we could fit this trial in in that three weeks or anything close to it. And that's the reason the court declared a mistrial.

Now, in the meantime, Mr. Henry, the law firm that was previously representing your client, Hobson, withdrew. And you entered an

1 appearance on behalf of Hobson, and you have been
2 active in the case since you entered your
3 appearance.

4 At the time I declared the mistrial, I
5 said that there would be no more discovery in this
6 case and that there would be no more substantive
7 motions absent an order from the court, and that
8 the court would consider motions in limine, to
9 take up matters that had to do with the
10 admissibility of evidence and the matters
11 involving the actual conduct of the trial.

12 So what I have received are the four
13 motions in limine and the motion to dismiss
14 Rudeen, and I believe that every party has filed
15 something in response to all of those various
16 motions.

17 I think the appropriate way to take it
18 from the beginning, at least, is to make a
19 determination about whether or not Mr. Oberrecht
20 is correct in saying that these are untimely
21 motions and shouldn't even be heard.

22 So, Mr. Oberrecht, I'm going to hear
23 your argument on that, if you would like to add
24 anything to what you have already given me in your
25 moving papers. And I will advise all the parties,

1 I have read absolutely everything that everybody
2 has given me.

3 Mr. Oberrecht?

4 MR. OBERRECHT: Thank you, Your Honor.

5 Your Honor has reiterated what we read
6 in the transcript of that last day, and so I won't
7 go over that again, but I remember it well.

8 These motions -- I will only address
9 the timeliness of the motions, the timeliness and
10 the fact that I believe the court had already
11 ruled that.

12 THE COURT: Right. I mean, if I agree with
13 you Mr. Oberrecht, we're finished. We're not
14 going to get to the substance of them.

15 MR. OBERRECHT: Correct. If, I got you.
16 Thank you, and I will be brief.

17 The issue having to do with the type of
18 motions is a very important issue because it has
19 to do with how much time you have to prepare. And
20 so this court has been in my practice very, very
21 deliberate in making sure that dispositive
22 motions, summary judgment motions, are filed on
23 time. And as I recall, when we brought motions or
24 when some of the parties brought motions within
25 the last month before the case that we tried in

1 front of you, the court said no, these aren't
2 really what I would consider to be motions in
3 limine. These are thinly disguised motions,
4 dispositive motions, and they're too late. And
5 I'm not going to entertain them at this time, so
6 off you go. So that's the way we tried the case.

7 With respect to the motion to dismiss,
8 to me a motion to dismiss is not even disguised as
9 a dispositive motion. If a motion to dismiss is
10 granted, it disposes of claims, and therefore that
11 is a dispositive motion. It's filed as a motion
12 to dismiss, but it's filed with summary
13 judgment -- or it's filed as a summary judgment
14 motion with affidavits and whatnot.

15 I think that clearly violates Rule 56.
16 It violates the court's pronouncement at the end
17 of the case because there has been no order from
18 the court allowing us to file dispositive
19 motions -- or at the end of trial I meant, excuse
20 me. And it also violates the court's amended
21 scheduling order which said you've got to file any
22 dispositive motions 90 days in advance. So
23 clearly, we didn't have enough time to respond to
24 any of that, and I still feel that we've been
25 prejudiced because of that, Your Honor.

1 I will set aside my substantive
2 arguments on that motion to dismiss.

3 On the motion in limine, Your Honor
4 indicated that the position that I was taking is a
5 little different from what I would like to take in
6 front of the court, and that is, I think all four
7 of the motions in limine are dispositive motions,
8 each and every one of them. They dispose of
9 either claims or defenses that the parties are
10 about to raise in this trial that is coming before
11 you.

12 We have the same issue with respect to
13 the court saying there will be no dispositive
14 motions, but I think I need to explain to the
15 court why I think these are dispositive motions
16 and what the court did to them previously.

17 What I meant to say was the first three
18 out of the four motions in limine not only are
19 dispositive motions but they're rehashes of
20 motions that were previously brought to you, you
21 ruled on, and in one instance, you were even asked
22 to reconsider.

23 You denied the reconsideration, and now
24 we're coming back on three of the four motions in
25 limine asking you to reconsider rulings that have

1 become the law of the case. I think that's
2 inappropriate, Your Honor, especially since I
3 think those are truly dispositive motions on
4 claims and defenses.

5 For example, the first one, it's
6 couched in the guise of excluding evidence
7 regarding work that involved pre-termination
8 change orders.

9 We had three change orders that we
10 filed on a waiver issue, and they, being the
11 plaintiffs, would like to flip that over and say,
12 "Now you've waived just like the contractors
13 waived in that process."

14 I won't get into the substance of that
15 right now, but Your Honor denied a motion in
16 limine that Rudeen brought before trial trying to
17 take the ruling on those three motions and expand
18 it to every one of change orders, and the judge
19 said no.

20 THE COURT: It wasn't very long before
21 trial, as I recall.

22 MR. OBERRECHT: Right, but it was untimely.

23 THE COURT: Right. And that's the reason
24 why I said I am just not going to hear this on the
25 11th hour just before trial. But anyway --

1 MR. OBERRECHT: But that was not because it
2 was having to do with trial evidence and giving
3 you an alert on what the do with trial evidence.
4 It wasn't really a motion in limine; it was a
5 dispositive motion.

6 The second one was, the state shouldn't
7 be able to present any evidence of claims, of
8 claims of the state's that relate to a termination
9 for convenience, because once you have a
10 termination for convenience, the state can't have
11 any defenses or offsets or counterclaims.

12 We argued that very early on in this
13 case in a summary judgment motion brought by
14 Hobson, and I believe it was argued more than once
15 in summary judgment motions, and this court denied
16 that. Analyzing this contract in saying under
17 this contract, different from contract clauses,
18 termination for convenience under the federal law,
19 you were going to allow us to present our
20 defenses, our counterclaims, and our offsets.
21 That's already been ruled on.

22 THE COURT: As I recall, there were two
23 reasons why Hobson thought that I should grant the
24 motion regarding the work that was done
25 pre-termination for convenience.

1 One argument, and you tell me if you
2 read it this way, Mr. Oberrecht, one argument was
3 that any work -- that the state's claim to any,
4 we'll call them, setoffs at this point, to any
5 setoffs -- that your right to claim setoffs
6 terminated when the contract terminated for
7 convenience on June 3, 2005. That was one reason.
8 The other reason, was that the one involving
9 seven-day notice and opportunity?

10 MR. OBERRECHT: No. There was a third one
11 on the notice issue.

12 THE COURT: That was the third motion in
13 limine.

14 MR. OBERRECHT: Right, right. And so I
15 think you've read that right. That's what court
16 previously ruled on under two clauses in the
17 contract, and I won't go into that. That's to the
18 merits.

19 THE COURT: I recall the clause that you're
20 referring to, and you pointed my attention to a
21 previous written order that I had entered saying
22 something to the effect that you reserved your
23 rights under some clause in the crime contract --
24 right? -- and how this wouldn't affect your
25 ability to come back and make certain claims? I

1 don't want to mischaracterize that or pretend that
2 I'm quoting it verbatim, but I recall your
3 argument on that issue as well.

4 MR. OBERRECHT: Okay. Two clauses: 13.4.1,
5 Duties and obligations imposed by the contract
6 documents and rights and remedies available there
7 rendered shall be in addition to and not a
8 limitation of duties, obligations, rights, and
9 remedies otherwise imposed or available by law.

10 And then this is the one that I think
11 you focused on: 13.4.2, No action or failure to
12 act by the owner, architect, or contractor shall
13 constitute a waiver of a right or duty afforded
14 them under the contract, nor shall such action or
15 failure to act constitute approval of or
16 acquiescence of a breach thereunder except as may
17 specifically or may be specifically agreed in
18 writing.

19 And we had also pointed out in that
20 argument to you, Your Honor, that in the notice of
21 termination, the state had specifically reserved
22 its right and said, This is not a waiver. And it
23 said, "As I believe you are aware, there have been
24 significant delays and added costs associated with
25 the project. This termination is not and shall

1 not be deemed as a waiver of any rights we may
2 have with regard thereto.

3 And Your Honor ruled on that
4 specifically saying, We preserved, as you said it,
5 our offsets. So to us that was the law of the
6 case and continues to be.

7 Then the third motion is no evidence of
8 damages because the state failed to provide
9 contractual notice. We argued that I think three
10 times, Your Honor, and the court ultimately ruled
11 okay, Mr. Oberrecht, you are going to have to
12 bring forth evidence to show actual notice and no
13 prejudice to be able to get around the contract
14 language.

15 And we argued case law to you, and you
16 said, But I'm going to hold you to that, and I
17 said okay, and off we went. That to us was also
18 law of the case.

19 Now, on the fourth item, it's new. You
20 haven't heard that before.

21 THE COURT: This was on the total cost
22 method of proving up Hobson's damages.

23 MR. OBERRECHT: Exactly. And to me what
24 they are doing here is not filing a motion in
25 limine. What they're saying is, you cannot raise

1 any defenses, that what we are doing is asking for
2 total costs or that you're -- or that we're asking
3 for costs. You can't raise defenses to that.
4 You're stuck because the judge ruled that, Hey,
5 since you terminated us for convenience, now you
6 have to pay termination for convenience payments
7 under the contract.

8 But, Your Honor, you specifically ruled
9 at the time you said, in essence, that, but the
10 state can raise its defenses, counterclaims, and
11 offsets. So I think this issue has indeed been
12 addressed by you before, but there are substantive
13 matters having to do with what the total cost
14 approach means, when you can assert it, and that
15 sort of thing. And all of those are not
16 evidentiary issues; those are partial summary
17 judgment issues.

18 Thank you, Your Honor.

19 THE COURT: Thank you, Mr. Oberrecht.

20 Next I'm going to hear from Mr. Henry.
21 And, Mr. Henry, rather than, again, getting into
22 the substance of the motion in limine --

23 MR. HENRY: Understood, Your Honor. We're
24 limiting this argument to the efficacy of these
25 motions.

1 THE COURT: Exactly.

2 MR. HENRY: And as Your Honor has seen, we
3 quoted the Idaho Trial Handbook in regard to
4 motions in limine and the plethora of Idaho
5 authority that indicates that the court has broad
6 discretion, and we cited case law to you.

7 And here is the gravamen of all of
8 this, Your Honor. These are not summary judgment
9 motions. Your Honor has established the law of
10 the case in a number of memorandum decisions and
11 orders, that among them items that Your Honor has
12 established is that this is a clear and
13 unambiguous contract.

14 And as such, Your Honor, as you're
15 aware and as we went to great pains to point out
16 in our moving papers, because it is clear and
17 unambiguous, all the interpretations of it are for
18 Your Honor and not for the jury. And we are
19 simply asking that in accordance with the fact
20 that a motion in limine in Idaho is a motion
21 seeking to obtain an advanced ruling on
22 evidentiary matters, that Your Honor apply the law
23 of the case, as you have determined it to be,
24 certainly in regard to the memoranda and orders
25 that Your Honor issued in July 2006, April 2007,

1 and again in October of 2007, all of which say
2 that Your Honor has determined that this contract
3 is clear and unambiguous.

4 Consequently, what we're asking
5 Your Honor to do in all of these motions is to
6 preclude evidence from being presented to this
7 jury that flies in the face of the plain meaning
8 of the contract. In your conclusion in your
9 October 31, 2007 order, Your Honor clearly said
10 that this matter, that you didn't need to go
11 outside the four corners of this document to find,
12 to determine the party's plain meaning.

13 And all we're asking Your Honor to do
14 is to apply that holding, the law of this case,
15 that the plain meaning is the plain meaning. And
16 to enforce that, to preclude the state from doing
17 those things that we believe fly in the face of
18 the plain meaning and those things that Your Honor
19 has already decided.

20 And, for example, without spending time
21 arguing the substance or portions of this motion,
22 Your Honor decided that the change order issue,
23 the change order issues, Your Honor said the
24 contract and the change orders are clear and
25 unambiguous.

1 Your Honor provided relief to Rudeen in
2 regard to that, indicating that the contractors,
3 that they had preclusive effect on the
4 contractors.

5 Your Honor indicated that the salient
6 provisions of Article 7 of the general conditions
7 of the contract indicated that they were clear and
8 unambiguous, and in fact the clear and unambiguous
9 portions of that contract, we would submit to
10 Your Honor, are preclusive as to all the parties
11 who executed a contract, who executed an amendment
12 to this contract, a fully-executed change order,
13 and as Your Honor said in several places, the
14 clear and concise language of those change orders.

15 And Your Honor saw fit, in interpreting
16 Article 7 and those amendments to the contract
17 that arose under Article 7 that are now part of
18 the clear and unambiguous contract, that
19 Your Honor has the sole discretion and the sole
20 duty to interpret, we're simply asking that the
21 evidence that would be presented to the jury
22 comports with the law of the case as Your Honor
23 has understood it, as Your Honor has declared it
24 to be.

25 The fact that a motion in limine may

1 have some impact, including preclusive effect on
2 one of the party's causes of action, is not a
3 reason to not to call it something other than what
4 it is, which is a request that the court limit the
5 evidence to be provided to the jury, and that's
6 the Appel case. I'm sorry, Your Honor.

7 THE COURT: Mr. Henry, as I recall, I had
8 made specific rulings with respect to three of the
9 change orders, 10, 12, and 13, I think. And then
10 I think Mr. Anderson, on the really close, maybe
11 even the morning of the trial or pretrial
12 conference, had asked the court to make
13 essentially the same ruling with respect to about
14 15 other change orders, and I said, Wait a minute.
15 This is a very substantive motion that you're
16 making here. I'm not prepared to rule on it.
17 It's too late anyway, and I'm not even going to
18 entertain it.

19 MR. HENRY: And that's the only reason, if
20 Your Honor will go back and look, that's the only
21 reason Your Honor gave for not entertaining it;
22 not that it wouldn't merit consideration.

23 And Your Honor was correct when you
24 came out today and indicated that the motions that
25 we filed were to have been heard here on the 16th.

1 And because of that fun telephone conference we
2 had three Friday days ago, Your Honor asked if the
3 state indicated it needed more time, Your Honor
4 asked if we would be amenable to that, and so here
5 we are eight days later than the original motion.

6 There's nothing untimely about the
7 motions in limine that we filed. They're to be
8 filed in 14 days' notice. We did that. They have
9 now had 22 days' notice. There's nothing wrong in
10 regard to the timeliness of this motion.

11 Simply, and in addition, Your Honor,
12 there's nothing wrong with the substance of the
13 motions, because they really go to those issues
14 the court has already decided and are within the
15 court's absolute sole purview in regard to how
16 this contract is to be interpreted by its plain
17 language.

18 It will be an exercise in how fast
19 people can get up to object, Your Honor. If in
20 fact those interpretations of the contract that
21 Your Honor has said under the plain language, and
22 we'll talk about the substantive of them, and
23 obviously we've briefed it in detail, Your Honor,
24 but we think the court has great discretion here
25 to apply what has already decided as the law of

1 this case, and it has the duty to make the
2 interpretations of the contract that it has
3 already and that are applied to the facts that
4 we're asking the court to limit.

5 We're not asking the state's claims to
6 be dismissed. That would be a CR-56 motion and
7 would have had to have been filed 90 days
8 beforehand. The fact that the motions that we
9 have filed, based on the court's previous rulings,
10 based on the law of this case, may have some
11 preclusive effect on one or more of the state's
12 causes of action, as my old grandpappy would have
13 said, of no, never mind.

14 It's just the natural fallout of the
15 fact that the court has made rulings, the court
16 has the duty to interpret the contract, and doing
17 both those things, the evidence that we're asking
18 to be precluded is properly before the court.
19 It's within its discretion, and we would direct
20 Your Honor back to the Appel versus LaPage case in
21 which that motion in limine was untimely filed.

22 It precluded a contract claim, and the
23 appellate court said it was perfectly within the
24 court's discretion to have done that, that it was
25 no surprise because the fact of the matter is,

1 that matter had been going on for a long time.
 2 And the evidence that the motion in limine was
 3 based on wasn't a big surprise to anybody.
 4 Similarly, there's a fine analogue here,
 5 Your Honor. This case has been going on for five
 6 years.

7 And there has been all kinds of
 8 discovery done in this case, all kinds of motions
 9 filed. And the fact that we've asked the court to
 10 take the law of the case that it's already
 11 determined and apply it in such a way that it
 12 would preclude the jury from being confused by the
 13 fact that the plain language of the contract is
 14 being contravened in regard to the evidence being
 15 presented.

16 And we have long objection colloquies
 17 about it. The fact of the matter is, Your Honor
 18 has the discretion to not only hear but grant, and
 19 we think you ought to.

20 THE COURT: Thank you.

21 One thing I didn't hear you talk about,
 22 Mr. Henry, did you address your motion to dismiss
 23 Rudeen?

24 MR. HENRY: Certainly, Your Honor.

25 THE COURT: And I get it. You said that --

1 now, this calls to mind Mr. Oberrecht's motion
 2 that was filed a couple of day's ago, maybe
 3 yesterday, asking the court to disregard another
 4 memorandum that came in in support of your motion.
 5 I think maybe Rudeen filed it.

6 Mr. Stefanic, do you remember?

7 MR. STEFANIC: To disregard one of my
 8 briefs?

9 THE COURT: No -- yeah. Mr. Oberrecht you
 10 had filed --

11 MR. OBERRECHT: It's SE/Z's joinder as
 12 another motion.

13 THE COURT: Fair enough. So it was Mr. Hahn
 14 had filed the motion saying, Hey, here is the rest
 15 of the rule. Standing is not an issue.

16 MR. HAHN: Yeah. And I would like to
 17 address the court on that issue.

18 THE COURT: And I'll give you a chance to do
 19 that.

20 I think the standing issue has been
 21 pretty well briefed.

22 MR. HENRY: I think so, too, Your Honor.
 23 Obviously Rule 14 allows any party to seek the
 24 dismissal of third complaint. 12(b)(6) motions
 25 can be granted at any time.

1 THE COURT: Now, Mr. Henry, you pointed out
 2 that I had granted a directed verdict in favor of
 3 Rudeen during the trial, and I think I made it
 4 real clear that that is the law of the case.

5 MR. HENRY: Condition and order.

6 THE COURT: Right. And as I remember, it
 7 was a motion to dismiss any claims that were based
 8 on professional negligence, because the state
 9 didn't have an expert witness to testify about the
 10 standard of care, and so forth.

11 Mr. Oberrecht's objection to dismissing
 12 their entire indemnity case against the architect
 13 was that you don't really need an expert to come
 14 in and testify about these things that are within
 15 the common knowledge of the average juror. Right?

16 MR. HENRY: That's what a few cases in Idaho
 17 say about legal malpractice.

18 THE COURT: Right. But you're saying this
 19 isn't one of those -- these claims against Rudeen
 20 are not those really easy motions. I mean, you
 21 don't need a medical expert for somebody to say,
 22 My leg wasn't broken before the car hit me and
 23 then it was broke.

24 MR. HENRY: If Your Honor wants me to
 25 address that, that's really part of what's in our

1 reply brief, but I would be glad to do it right
 2 now, which is the examples that the state gives in
 3 its opposition are that it doesn't take an expert
 4 to understand why the glycol system on the make-up
 5 air unit required the valves that are controlled
 6 by the computerized direct digital control system
 7 to be normally open or normally closed.

8 It doesn't require an expert apparently
 9 to describe why -- what Rudeen's sub consultant,
 10 Rudeen and its sub consultant, did with regard to
 11 how quickly they responded on the submittal
 12 issues, why that's beyond the understanding of a
 13 layperson.

14 Well, clearly, Your Honor, somebody is
 15 going to have to get up and testify that, gee,
 16 whiz, architects and engineers have a duty to do
 17 this stuff quickly, and they should have done it
 18 about this fast and they didn't. But they don't
 19 have that kind of a witness, Your Honor.

20 Similarly, in trying to have lay
 21 people -- and I have a judge friend in
 22 Pierce County who always refers to his jurors as
 23 12 little old ladies from Gram, but that's how he
 24 asks, This is how you're going to have to explain
 25 this.

1 And having to explain to 12 lay people
2 what the -- whether the solenoid valve should have
3 been normally opened or normally closed or failed
4 to open and failed closed and what the
5 ramifications of that are and why they should have
6 known better than to have done what they allegedly
7 did, I don't think that's probably within the
8 contemplation of most people that don't have some
9 kind of passing familiarity with the hot water
10 heating systems that go into modern HVAC systems
11 and bioscience Level 3 laboratories.

12 THE COURT: So it's your contention that any
13 claim against the architect really has to be
14 supported by the testimony of an expert,
15 architect, who would testify that, number one,
16 they're familiar with the standard of care for
17 architects in this community during the relevant
18 time period, and we know we don't have that.

19 MR. HENRY: I think that's what the case law
20 says, Your Honor, and especially in regard to
21 Justice Shepherd's quotation that we provided you
22 in our moving papers, that his opinion is that in
23 Idaho, to prove any claim for professional
24 negligence, you've got to provide expert
25 testimony. And in their opposition, the state has

1 motion, and I say Rudeen is out and the indemnity
2 claim against Rudeen is gone.

3 Then during the post-proof jury
4 instruction jury charge, I tell the jury that the
5 state's architect, Rudeen, is an agent of the
6 state. And if you find that Rudeen screwed up, if
7 any of these delays and extra work, and so forth,
8 were the fault of the architect, that's on the
9 state. Right?

10 MR. HENRY: The problem, Your Honor, is that
11 now we've crossed away from what happens if we
12 dismiss Rudeen and the state has no indemnity
13 claim, to what the measure of damages are for the
14 termination for convenience.

15 And whether or not -- and this goes to
16 the motion that Rudeen has filed that essentially
17 says, first they filed the motion that is kind of
18 their own motion and a joinder with ours in regard
19 to this, where they say, Well, given the court's
20 ruling at the directed verdict that no direct
21 claims can be made against the architect either by
22 Hobson or by SE/Z on behalf of Hobson under a
23 Spearin doctrine type claim, that somehow the
24 plaintiffs are precluded from putting on any
25 evidence or including in their calculation of

1 to acquiesce that all its claims against Rudeen
2 are for professional negligence. It doesn't have
3 any other ones. And it tries to indicate that
4 those few cases that are out there in Idaho
5 authority that indicate that something that's
6 within the easy contemplation of a layperson in
7 regard to the malpractice issue, and the examples
8 are somebody that settles a case without their
9 client's consent.

10 I mean, that's pretty obvious. You and
11 I might have understood that before we went to law
12 school, but the fact of the matter is, there's no
13 analogue here, even with the examples that they
14 provide in their opposition.

15 Rudeen, to have any liability here,
16 somebody is going to have to talk about what
17 architects are supposed to do, establishing the
18 standard of care, and that that standard of care
19 was somehow breached. And with no witness
20 declared, with no expert report to submit, we
21 don't understand how they get there from here and
22 apparently neither does Rudeen.

23 THE COURT: Well, let me ask you this
24 question, Mr. Henry. Let's say I grant your
25 motion. Let's say I entertain and grant the

1 damages any amounts that had anything to do with
2 the design, professions, but that's a different
3 argument, Your Honor. And that argument is about
4 what 14.1.3, which Your Honor has already decided
5 was the measure of damages for termination for
6 convenience, what that means.

7 And obviously we've briefed that
8 extensively for Your Honor, and that's the
9 substantive portions of these motions. And so far
10 you haven't asked me to get there.

11 THE COURT: Thank you very much.

12 Mr. Hahn, SE/Z's position on the
13 propriety of going forward and entertaining these
14 motions.

15 MR. HAHN: Thank you, Your Honor, but first
16 of all, the issue of SE/Z's filing a joinder. We
17 did have an informal telephone conversation with
18 the court, and the court's instructions to all
19 parties were, if you're going to file anything,
20 and anyone can file, it needs to be served by
21 5 p.m. on the 17th, and then the reply was to be
22 two days later by Hobson.

23 That's all we did. We didn't file a
24 separate motion. We did file an affidavit, and
25 that was a day later; didn't put anything new in

1 the record. It was more for the convenience of
2 the court and counsel.

3 THE COURT: Right. And I think all you
4 filed was your joinder in the Hobson motions?

5 MR. HENRY: The two motions and also our
6 affidavit which put what we were referencing in
7 our briefing before the court so you didn't have
8 to dig through -- my guess is, this filing is
9 large in your office, and we simply did it for the
10 convenience of the court and counsel.

11 So I don't think the objection is
12 well-founded. We followed the court's
13 instructions.

14 But the propriety of the motion to
15 dismiss, DPW, counsel for DPW, harkened back to
16 these issues and motions before we started trial.
17 The motion to dismiss really stems from the
18 court's granting of the directed verdict motion,
19 because once the court granted that, issues fell
20 out of this case.

21 The damages that the plaintiffs are
22 seeking, and the plaintiffs by that I mean Hobson
23 and SE/Z on its cross claim, relate only to the
24 termination for convenience clause, the
25 contractual clause, which the court has held where

1 there is liability, and we need to put on evidence
2 of what those costs are.

3 So the issues of professional
4 malpractice are gone, at least as it relates to
5 the plaintiff's claims, SE/Z's and Hobson's, which
6 takes us directly to Rule 14. Once the court
7 entered that order and the order that was recently
8 signed by the court, then we look at Rule 14, and
9 there is no longer a proper third party complaint
10 before the court, because there's no derivative
11 liability.

12 DPW can't say, If we're liable to you
13 under our contract damages, under the T for C
14 damages, then we can shed this off to Rudeen. And
15 so I think that the motion is perfect at this
16 juncture. It's within the court's discretion,
17 should be ruled on, and we should hear the
18 substantive nature of it, because those third
19 party liability issues are gone in this case.

20 Thank you.

21 THE COURT: Thank you, Mr. Hahn.

22 Mr. Stefanic, I'll give you the final
23 word on this question. And again, remembering
24 that the question is, really I'm dealing with
25 Mr. Oberrecht's objection to the propriety of

1 hearing or entertaining at all four motions in
2 limine and the separate motion to dismiss the
3 indemnity claim that the state has brought against
4 Rudeen, your client.

5 MR. STEFANIC: Correct, Your Honor. And we
6 join in that motion obviously to get Rudeen
7 dismissed, but we filed our own fourth motion in
8 limine, and that sought to limit testimony
9 regarding evidence of professional conduct against
10 Rudeen in this particular case by any party under
11 any theory. And that's to ensure that there's no
12 confusion and that type of evidence and it's wrong
13 evidence to go to the jury.

14 The gravamen of any cause action
15 against Rudeen is professional negligence. The
16 case law is clear unless it's something very
17 ordinary, you need an expert. You need an expert
18 to testify as to what the particular standard is,
19 and you need an expert to testify that that
20 standard was breached.

21 And counsel has talked about the issue
22 of the ordinary knowledge of a juror in this
23 particular case, so I'm not going to go over that.
24 So in the interest of justice, Your Honor, and in
25 looking at these evidentiary issues, it's

1 imperative that the court take into consideration
2 and limit that type of evidence at trial against
3 Rudeen.

4 Now, having said that, then you look at
5 the ramifications of what that ruling is, which
6 means that at this level up here, at the SE/Z
7 Hobson level, they don't have an expert to testify
8 about that. They readily admit it. In fact, they
9 say they don't need it. They just have a contract
10 claim with the state.

11 And so the question really is, since
12 they don't have an expert to testify that there's
13 anything wrong with the design, that there's
14 professional negligence, there is nothing to go to
15 the state that eventually will be passed to us in
16 a contribution or indemnification action.

17 THE COURT: Mr. Stefanic, let me ask you
18 this question: The architect, your client, was
19 deeply involved in the construction of the
20 project. They designed it. And then when issues
21 came up, for example, I remember there was this
22 humidifier issue which originally I think
23 everybody thought was going to be 7,500 pounds,
24 and it turned out to be 9,000 pounds. And the
25 parties, the architects said, Well, you guys, if

1 you're going to put a 9,000-pound thing up there,
2 we don't have the structural support for that in
3 our design. We're going to have to really change
4 things around a little bit. Right?

5 I mean, your client was involved in
6 those kinds of ongoing modifications or whatever
7 you want to call them.

8 MR. STEFANIC: You're correct, Your Honor.
9 That I think that had to do with the MAU unit.

10 THE COURT: The architect was the agent of
11 the state, weren't they?

12 MR. STEFANIC: I mean, they had a contract
13 with the state, and they worked with respect to
14 that thing. And the way that came about is that
15 they had had specified a certain MAU unit, and the
16 submittal came back that was heavier. And so an
17 analysis had to go into that as to whether it was
18 appropriate for that particular thing, and if it
19 wasn't appropriate, what bracing needed to come up
20 to support it, and whether that would affect the
21 continued operation of the lab while it was going
22 on.

23 And all of that, Your Honor, is heavily
24 involved with professional judgment and analysis
25 and calculations, things that are outside the

1 ordinary knowledge of a juror, and you need an
2 expert to testify about.

3 THE COURT: Well, if I dismiss the claim
4 against Rudeen, isn't that enough for you? Your
5 people are still going to have to be called as
6 witnesses in this case.

7 MR. STEFANIC: That may very well be,
8 Your Honor, which is an interesting point too. It
9 seems like in this particular case, the
10 contractual issues between these folks here and
11 the state, they somehow may be taking the position
12 that they've contracted around and taking away our
13 right, which requires that if you're going to talk
14 with about our design, if you're going to
15 criticize our design or our actions as
16 professionals, we don't need to bring an expert
17 against you. That's the T for C claim, and I
18 guess we'll get it into substantively.

19 THE COURT: But keep in mind, I'm saying
20 assuming for the sake of this question that Rudeen
21 is out. Rudeen has no liability to anybody, but
22 after all, the state hires this architect. The
23 state doesn't have a stable of architects
24 presumably in the Department of Architecture to
25 come in and prosecute all their work and to design

1 all their projects, and so forth. So they go out
2 and hire somebody on a contract basis, and in this
3 case it happened to be you, and you guys become
4 the agent of the state, of the owner.

5 And if somebody wants to sue the state
6 saying, Look, we as contractors and contractors
7 were going off the plans of these architects. I
8 mean, the owner gave us this information. We
9 found along the way as we were building this thing
10 that this wasn't going to work, so we went back
11 and worked with them, and that cost us extra
12 money, and so forth, and it's ultimately the
13 state's fault.

14 I just want to make sure that you're
15 not suggesting -- well, or maybe you are
16 suggesting -- that because your client Rudeen is
17 an expert architect and there is no expert to come
18 in and say their work fell below -- amounted to
19 professional negligence, I don't think that the
20 contractors have to prove malpractice.

21 I don't think they have to prove
22 professional negligence. I think they just have
23 to prove that the designs that they were following
24 were the designs that were given to them by the
25 owner and the owner's agent.

1 MR. STEFANIC: I think there's two issues
2 there. One, obviously the contract between those
3 guys is the contract between those guys.

4 THE COURT: When you say those guys --

5 MR. STEFANIC: The state and SE/Z.

6 THE COURT: The contractors.

7 MR. STEFANIC: Yeah. I apologize. The
8 court reporter can't get me gesturing. But the
9 point is that if the damages are contained within
10 that contract and don't trickle down to Rudeen in
11 terms of contribution or indemnification or
12 something like that, certainly there's no expert
13 testimony, and those claims should be dismissed
14 against Rudeen.

15 What I'm saying is, if you're looking
16 within that contract, I think that was another
17 tier of my analysis, Your Honor, is I'm not sure
18 that it would be my position that if you're
19 criticizing a design professional even within that
20 contract, that you would still need expert
21 testimony. That's certainly my position. But I
22 don't even think -- I mean, that's a tiered
23 approach here, and then you go down to this
24 analysis between the state and Rudeen where
25 there's no expert as well. I think either way

1 Rudeen should be dismissed.

2 THE COURT: Thank you.

3 MR. OBERRECHT: Your Honor, I understand --

4 THE COURT: It's your motion. You get the
5 final word on this issue.

6 MR. OBERRECHT: Thank you, Your Honor.

7 Your Honor, I didn't think that we were
8 going to get into the substance of the motion to
9 dismiss on whether or not there was an expert that
10 was needed. I was reserving that out to argue
11 later.

12 THE COURT: Okay. We'll leave it out for a
13 minute.

14 MR. OBERRECHT: But if the court rules that
15 we need to go forward, I do want to be heard.

16 THE COURT: I'm going to rule that way.
17 Listen, I was going over this too. When I say I'm
18 going to rule that way, I'll tell you how you how
19 I intend to rule, and this is the ruling of the
20 court on this discreet question.

21 At the end of the trial, I said no more
22 discovery. This case has been worked over by the
23 parties so diligently and so carefully and at such
24 obviously great expense to everybody involved in
25 this case, and here we are in the middle of trial

1 and unfortunately something unforeseen has
2 happened. It would be no different than if the
3 jurors' bus ran off the road during the middle of
4 the trial. Like it or not, we could not proceed
5 with this trial, and I didn't want to reopen
6 everything and relitigate everything again as
7 though we hadn't been through all that pretrial
8 litigation and preparation before the beginning of
9 the last trial.

10 So I said, first of all, discovery is
11 frozen. Secondly, I don't want any more
12 substantive motions without further order of the
13 court.

14 This case, then, from my perspective,
15 from the court's perspective, sat quite dormant.
16 I mean, the law firm for Hobson got out, and
17 Hobson hired a new attorney, and so forth. But I
18 know the parties haven't been engaged in a lot of
19 discovery.

20 I think that, when was it, three months
21 ago, maybe four months ago when this thing started
22 to wake up again, we had some sort of a status
23 conference. And my recollection is that I had
24 suggested that it might be a good idea if I set
25 out some deadlines for filing motions, and so

1 forth. And I was asked by some, if not all, of

2 the parties that it might be a good idea rather

3 than imposing deadlines -- for the court to

4 refrain from imposing any deadlines for filing

5 substantive motions, and so forth, because the

6 parties I think told me, if I'm remembering

7 correctly, that would cause the parties to

8 immediately have to gear up, to be ready, to start

9 filing motions, start waking the case back up

10 again and to really dig into it some four months

11 before trial. And I think the parties might have

12 informed me that they still thought there was a

13 possibility that some kind of a negotiated

14 settlement might be reached, I think.

15 Now, so I refined from saying, Okay,

16 well, you've got to get any motions in by a

17 certain date.

18 Next thing that happened is I get the

19 motions from you, Mr. Henry, and they're couched

20 in terms of motions in limine and then the one

21 motion, substantive motion to dismiss. I read

22 this stuff, and my first inclination is to agree

23 with Mr. Oberrecht that nobody has asked for leave

24 of the court to even file such motions so close to

25 trial. We don't want you to even hear them. The

1 law of the case is the law of the case, and let's
2 go forward.

3 Mr. Henry, I think you appropriately
4 enough said that this is an awfully informal way
5 the handle these matters, so let's have this
6 hearing today, on the 24th of March, and here we
7 are. And I think this is the better way to do it.

8 When I looked back at the language that
9 I used when I declared the mistrial and said that
10 there would be no substantive motions filed and
11 entertained by the court without leave of the
12 court, it occurred to me that it's true, I didn't
13 a year ago file a notice or an order or something
14 saying I'm open for business again, feel free to
15 file all the substantive motions you want.

16 Instead I got what I considered to be
17 really substantive motions. But I guess in really
18 reviewing what I said, I'm being asked
19 essentially, Judge, will you hear these
20 substantive motions?

21 And my answer to that is, Yeah, I will.

22 So just so the record is clear, and I
23 don't mean to prejudice any party, the motions
24 will be entertained by the court whether they're
25 called substantive motions or merely motions in

1 limine.

2 So all of this is on the table, and we
3 really have six things to decide. We have these
4 four motions in limine, and we'll just call them
5 the motions in limine, and we have the motion to
6 dismiss the indemnity claim against the architect.
7 And then we have Mr. Stefanic's motion which is
8 essentially that not only should Rudeen be
9 dismissed but any claims involving the designs and
10 the work that Rudeen did as a professional
11 shouldn't even be brought before the jury. Those
12 are the matters that are before the court right
13 now.

14 Now, having said all that, I'm going to
15 entertain your substantive arguments on the
16 substantive motions. Here is the way I see this
17 case. When this case was -- the case was brought
18 before the court with various motions, various
19 motions for partial summary judgment, and so
20 forth. There were a lot of pretrial motions and a
21 lot pretrial orders that have been entered, and I
22 looked back over all of the orders that I ever
23 entered, and I don't find that the orders that
24 I've entered have been inconsistent with each
25 other. I think they're pretty much down the line.

1 I have to say that by the time we got
2 to trial, I thought everything was ready to --
3 that we were all ready to try the case and ready
4 to go. And I think that's the reason why I denied
5 Mr. Anderson's motion to apply my ruling on the
6 three change orders to all of the change orders,
7 because I thought, well, this is so late in the
8 game, I'm just not even going to hear that stuff.

9 So here is the way I see this. The
10 state decides to build the biohazard lab. The
11 state enters into the prime contract with SE/Z and
12 hires an architect, Rudeen, to draw it up and to
13 work with SE/Z and their subcontractors.

14 SE/Z hires Hobson as the mechanical
15 contractor, and under the terms of that
16 subcontract, Hobson agrees that they're going to
17 be bound by all of the terms of the prime
18 contract.

19 The contracts in this case are these
20 complex documents. You attorneys who practice in
21 this area of construction law are much more
22 familiar with them than I am. But I can tell you
23 that to the extent that my eyes glazed over during
24 some of the presentation of the evidence when we
25 were presenting during the trial, portions of the

1 contract and asking people what they understood it
2 to mean, and so forth, my eyes were glazed over.
3 I think the jury was just floating in the breeze.
4 I mean, it must have been incredibly difficult for
5 them to try to keep up with the main threads and
6 the main arguments and the testimony in the case.

7 We had that little question and answer
8 period at the end of the trial because I wanted to
9 thank the jury and explain to them why I had to
10 cut it short. And obviously all of you attorneys
11 who were present during that and all of you
12 parties who were present during that colloquy, it
13 was pretty apparent that the jury thought, boy, I
14 hope this comes together sometime, because two
15 weeks into the trial, this is just almost
16 hopelessly complex.

17 So in thinking about how we're going to
18 handle this trial as it is coming up, it seems to
19 me that when the parties entered into the contract
20 that contained provisions for termination for
21 cause and alternatively terminations for
22 convenience, essentially I read that termination
23 for convenience clause as saying, look, if things
24 are getting fouled up and the parties for whatever
25 reason just aren't working well together, the

1 contractors can terminate for convenience, the
2 owner can terminate for convenience, the owner
3 terminated for convenience.

4 And there's a provision in the contract
5 that says, if the owner terminates for
6 convenience, the contractor comes in and gives him
7 a final bill and says, look, here was our bid,
8 here were our change orders, here is the amount
9 you've paid us on our bid and for the work that
10 we've performed thus far. Here is the amount of
11 money that you have paid us for each one of these
12 change orders, here is our final bill.

13 And essentially the owner is
14 essentially agreeing, we're not going to quibble
15 about it an awful lot. Thanks for playing. How
16 much is your bill? We're going to pay you for all
17 of the work that you've executed, and that's that.

18 Now, what has happened here is instead
19 of Hobson coming in and saying, "Our bill is
20 \$4,000, this is what you still owe us," they have
21 said, "Our bill is \$2 million," in rough figures.

22 And, of course, the state says, "That's
23 absurd. You're not entitled to anything like this
24 kind of money, but as long as you have sued us,
25 we'll going to sue you back. And we're going to

1 have a jury decide whose fault this thing was, why
 2 this project really blew up halfway through."
 3 And at the same time, the state brings
 4 in their architect, which they must have been kind
 5 of reluctant to do because their interests are
 6 pretty much the same other than this indemnity
 7 issue. The state is saying, "Well, look, if, God
 8 forbid, the jury should determine that we actually
 9 owe all this money, the architect has to indemnify
 10 us because we were relying on their professional
 11 expertise."

12 And then halfway through the trial, all
 13 parties admit that no plaintiffs nor the state has
 14 a professional architect who will testify that the
 15 architect has breached the standard of care for
 16 professional architects.

17 And so I granted the directive verdict
 18 on the architect's professional negligence claims,
 19 since that's as far as we went. We just didn't
 20 get any further in that trial.

21 Now, I'm not ruling on the substantive
 22 issues yet. I'm giving you what I hope is the
 23 benefit of my thinking on this thing, because we
 24 have a jury trial that is starting in two weeks,
 25 and I want to be able to have pretrial, if

1 possible, a set of post-proof jury instructions
 2 that I can give to this jury that's going to make
 3 sense of this thing.

4 Now, when we get to the substance of
 5 these motions in limine, essentially the way I
 6 look at all of them is that the state -- and some
 7 of them I have ruled on already. The contractors
 8 are saying, "Look, Judge, number one, the state
 9 can't give us -- the state can't come after us on
 10 a counterclaim" -- and I think I dismissed the
 11 counterclaim. I think all they have left is
 12 the --

13 MR. HAHN: Cross claim against SE/Z,
 14 Your Honor.

15 THE COURT: Yeah. But it's basically for
 16 setoffs as opposed to --

17 MR. OBERRECHT: That's not right. That's
 18 not right.

19 THE COURT: Don't confuse me with the facts
 20 for a minute. Okay? I'm going to give you an
 21 opportunity.

22 MR. OBERRECHT: Okay.

23 THE COURT: But what I'm saying here is,
 24 when I step back and take a look at the big
 25 picture here -- and I don't blame any of you. I

1 mean, you folks are advocating for the best
 2 interests of your clients every step of the way,
 3 and I admire it.

4 I read this, as the contractor saying,
 5 Look, anything that the state wants to claim
 6 against us, whether you call it an offset, a cross
 7 claim, counterclaim, you name it, is improper.
 8 Number one, the minute they terminated this
 9 contract for convenience, the contract was
 10 terminated, any right that they had to claim
 11 additional money or setoffs or anything else was
 12 terminated the instant -- the contract was
 13 terminated. That's one argument.

14 Another argument is that, They didn't
 15 give us notice of their claims against us and an
 16 opportunity to cure as they're required to do
 17 under the contract. So to the extent that the
 18 contract required them to do that while the
 19 contract was in existence, they didn't do it.
 20 They can't come back on us now.

21 And we want to use this total cost
 22 method approach for the measure of damages based
 23 on our belief that the actual step-by-step damages
 24 for individual discreet expenses that were
 25 incurred by delay or by extra work are just so

1 difficult to calculate that we have to just come
 2 in and say, Look, this is the bid. This was all
 3 the work we did. The bid was reasonable. We had
 4 to do all this extra work. Let us give you just
 5 one big gross bill and pay it that way.

6 So that's sort of in very broad
 7 strokes, sort of the way I see this. And I am
 8 inclined to say the real crux of this case is the
 9 contract terminated for convenience, the parties
 10 are obligated, the state is obligated because they
 11 terminated for convenience, to pay the
 12 contractors -- and, again, this is in very broad
 13 strokes, I'm not trying to quote a term of art or
 14 quote the contract.

15 But basically the state says, If we
 16 terminate you for convenience, you give us that
 17 final bill, and we're going to give you a check
 18 and kind of no questions asked. But then when
 19 they get a \$2 million bill, they're saying, Wait a
 20 minute. We think we owe you \$4,000; not
 21 \$2 million. I think the work billed for and paid
 22 was somewhere in the neighborhood of \$700,000,
 23 \$734,000, something in that neighborhood.

24 So they get a bill for \$2 million, and
 25 they say, Well, if we're going to have a fight

1 about whose fault the delays were and the extra
2 work was, and so forth, for goodness sake, Judge,
3 at least let us defend ourselves. At least let us
4 demonstrate to the jury that it wasn't our fault
5 that all of these things were done.

6 We thought they did lousy work, and
7 that's the way it is. And so let us put on our
8 evidence to that effect.

9 And I think if this case is approached
10 essentially from that, from that level where it's
11 pretty simple for the jury to grasp, and I'm not
12 saying it's simple. We have really good jurors in
13 Ada County. If we can approach it from that
14 level, I think it's going to make sense to the
15 jury, and they're going to ultimately render a
16 verdict that is based on essentially how much
17 Hobson is entitled to for the work that they did
18 and how much the state owes them, how much of the
19 extra work was the state's fault because they had
20 lousy plans or an incompetent architect or
21 something like that. Do you see what I mean?

22 So I want to approach -- I'm hoping
23 that the rulings that I make on these issues after
24 I hear your arguments, I hope the parties
25 understand that I come into this case today,

1 knowing that we have that trial in two weeks and I
2 am aiming to have my mind around all of this
3 really, really well so that I can be sure that it
4 is presented to the jury in a way that they really
5 get the gist of the case rather than asking them
6 to interpret contractual provisions and asking
7 witnesses how they interpreted a contractual
8 provision, and so forth.

9 So I would just offer those preliminary
10 comments before we get into the substance of the
11 motions in limine and I guess two motions to
12 dismiss Rudeen.

13 So with that, Mr. Henry, if you would I
14 want to hear anything you have to say about these
15 five motions that you filed, the substance of
16 them, and I get the rest of it. Tell me what you
17 think, and then I'll hear from each party.

18 MR. HENRY: Your Honor, just by way of
19 procedure, would Your Honor like to go in the
20 order in which they were filed? If Your Honor has
21 something in mind in regard to the motions to
22 dismiss, maybe we've got a shorter way to dispose
23 of those first.

24 THE COURT: Let's take up Rudeen first. I
25 want to be careful, because there is a suggestion

1 in -- there's an argument that came in from one of
2 the parties that said, Look, if you dismiss Rudeen
3 immediately, then there are things that you can't
4 even let Rudeen talk about.

5 So I was thinking, well, maybe I
6 misread it, but it seems to me that Rudeen is just
7 about the simplest of all of them to take up. And
8 I think you've kind of gotten perhaps a signal
9 from me that the way I've been thinking is that
10 whatever you want to call this, if it's a
11 professional negligence claim or a breach of
12 contract claim, I am leaning toward letting Rudeen
13 go, making him a nonparty, making them a nonparty
14 in this case and based on the fact that there is
15 no expert who -- and nobody claims there is going
16 to be an expert.

17 So that's kind of way I'm leaning, and
18 then to let the jury know that nevertheless, the
19 state hired these people, whether they're
20 architects or construction managers or what have
21 you, and they were the people who were carrying
22 the owner's, the state's, water. They were their
23 agent, and if you find that the state screwed up
24 through their employees or through any of their
25 agents and that that cost you money, that that's

1 on the state. The indemnity claim is gone because
2 of no testimony about the standard of care for
3 architects.

4 So that's the way I'm leaning.

5 MR. HENRY: Your Honor, I've addressed this
6 already, and so rather than burden the court any
7 more with hearing me drone on again about the
8 substantive part of this motion and the fact that
9 obviously Your Honor has determined the standing
10 issue because we're here arguing this, we're down
11 to what Your Honor just said: No expert declared,
12 too late to declare one now, an admission by the
13 state that all their causes of action are for
14 professional negligence. The substance of the
15 case law that we have provided for Your Honor
16 indicates you've got to have one, so they're out.

17 We think that that's the logical
18 conclusion there. However, I guess falling on
19 that comes this fourth motion in limine from
20 Rudeen. And I think that talking about these both
21 together probably makes some sense.

22 If the court is going to dismiss
23 Rudeen, it becomes a nonparty. I can't walk into
24 any trial and ask the court to grant a motion in
25 limine that they won't talk about me. That's not

1 the way it works. If they're a nonparty, they're
2 going to have no standing to bring a motion in
3 limine and ask the court to limit any evidence.
4 The fact of the matter is, the state
5 may be able to have an empty chair defense. I
6 don't know. We would say not because we think
7 that there's really only one measure of damages
8 here, and we'll get into that before this
9 afternoon is over.

10 And consequently, we don't think it
11 matters a whit whether Rudeen is here or not.

12 THE COURT: Now I remember, Mr. Henry. I
13 think it was memorandum that sort of called that
14 to mind. If you dismiss Rudeen, the claim against
15 Rudeen now, you don't hear Rudeen's motion.

16 MR. HENRY: Yeah, absolutely. They're out.
17 And if Your Honor is leaning toward that, we think
18 that Your Honor kills two birds with one stone
19 here. And we don't spend any more time arguing
20 about whether or not the contractor, who has an
21 actual cost recovery under the plain language of
22 the contract, somehow has to go in and parse out
23 all the hours that it spent arguing with
24 Traci Hanegan about the humidifier issues.

25 THE COURT: Well, don't count on that.

1 matter is, the basis for that is the fact we've
2 been terminated for convenience. The basis for
3 that is not we've got some third party beneficiary
4 attenuated claim under the Spearin doctrine
5 against a nonparty.

6 That's not -- we don't think that's
7 what Your Honor meant when he granted the motion
8 for partial -- granted in part I guess the motion
9 for summary judgment on the measure of the T for C
10 damages, on the termination for convenience
11 damages. We don't think that's what the plain
12 language of the agreement says.

13 But at the same point in time,
14 Your Honor, if they're gone, they can't make a
15 motion in limine. We'll leave it at that.

16 THE COURT: Thank you. And I'll do this.
17 Let's flesh this dismissal of Rudeen out
18 completely before we get to any of the other
19 motions.

20 Mr. Hahn, do you want to be heard
21 anymore on that one?

22 MR. HAHN: Your Honor, I think the point I
23 made earlier was procedural, but I think it's also
24 substantive, and that is the nature of the claims.
25 And the nature of the claims are termination for

1 MR. HENRY: Well, I'm not counting on that,
2 Your Honor, but we're certainly going to argue it
3 to you today.

4 THE COURT: Fair enough. And I'll tell you,
5 Mr. Stefanic, I'm not going to toss you out of the
6 case before I hear your argument on both your
7 motion to dismiss and on Hobson's motion to
8 dismiss.

9 MR. STEFANIC: Thank you, Your Honor.

10 MR. HENRY: So, Your Honor, no expert, have
11 to have one, don't have one. Will Your Honor
12 dismiss direct claims between Hobson and Rudeen,
13 any indirect claims that would go through SE/Z
14 that have a basis, that would be a Spearin
15 doctrine like basis where we're talking about
16 defective plans and specifications, Your Honor has
17 thrown those out.

18 So we would be precluded from saying to
19 Your Honor, and obviously that, gee, whiz, our
20 damages result from plans and specifications.
21 We're going to say this is the amount of work we
22 did, and implicit in that is that we did it per
23 some plans and specifications.

24 And we're going to say this is the
25 actual costs that we incurred. The fact of the

1 convenience, and there's no basis for a third
2 party complaint, and Rudeen should be gone, and
3 that will cut our eight-week trial down
4 significantly as well.

5 THE COURT: I agree.

6 MR. HAHN: Thank you, Your Honor.

7 THE COURT: Thank you, Mr. Hahn.

8 I guess I'll hear from Mr. Stefanic
9 next. I take it, Mr. Stefanic -- well, obviously
10 you join in the Hobson motion to dismiss Rudeen,
11 but I guess I need to hear a little bit more about
12 the rest of it.

13 I'm thinking that if the claim is going
14 to be -- if the indemnity claim by the state
15 against you is dismissed, I'm telling the jury
16 that, Hey, the architects who were involved in the
17 case were the agents of the owner.

18 MR. STEFANIC: Your Honor, the state's third
19 party complaint has three causes of action:
20 breach of contract, indemnification, and
21 contribution. All stem from the same thing. If
22 we get tagged for something the design team does,
23 under any of these theories, you're responsible
24 for it.

25 Our position is, is that there's no

1 expert up at this tier at the SE/Z Hobson level,
2 that there's nothing to pass down to the state
3 that could conceivably be attributed to us based
4 on expert testimony, which is necessary.

5 THE COURT: But, again, if Rudeen is hired
6 by the owner of the project to do the plans and to
7 work hand-in-hand with the people who were
8 actually doing the building of the thing, and if
9 evidence and testimony is presented that it was
10 architect A or architect B or architect C, it
11 doesn't matter where they came from other than --
12 I mean, the important thing is that they were
13 agents of the state.

14 MR. STEFANIC: I see you're grimacing when I
15 talk about that upper tier. I understand that
16 there's a couple ways that the court could
17 obviously go in this case. The bottom line is,
18 Rudeen -- the causes of action against Rudeen
19 ultimately should be dismissed with prejudice, so
20 they don't have to worry about those anymore. But
21 there's a couple of ways the court can go.

22 The one is the first tier about the
23 proof SE/Z and Hobson have to make on the T for C
24 claim. I have an argument there that that expert
25 testimony is required there before they can pass

1 of course, our witnesses -- well, obviously our
2 witnesses to this whole thing will be available
3 for trial and I'm sure has some things to say
4 about what was going on. There's no doubt about
5 that.

6 But the question is, can they be
7 responsible under the third party complaint by the
8 state based upon that, and I say no. And I don't
9 know if you need any more particular argument on
10 that right now, and I'll wait on the fourth motion
11 in limine, which is --

12 THE COURT: The total cost?

13 MR. STEFANIC: Well, I would join with the
14 state's position. We have joined with the state's
15 position on the total cost approach. We disagree
16 that that is in fact the way this should go, but
17 having said that, I don't know if you have any
18 other questions.

19 THE COURT: I don't. I'm going to hear from
20 Mr. Oberrecht finally on this one issue of
21 something that is going to affect you a great
22 deal, Mr. Oberrecht, and that is the state's claim
23 for contribution or indemnification against your
24 architect.

25 MR. OBERRECHT: With due respect,

1 that down, but that's one way the court can go.
2 The other way is that since the state doesn't have
3 an expert, there's nothing that can be passed to
4 us in terms of defective plans and specifications.

5 THE COURT: Well, as long as you bring that
6 up and Mr. Henry brought it up, too, about whether
7 the jury is finally presented with his total cost
8 method approach to determine the damages or, as
9 I'm more inclined to do, have the hours of
10 testimony from the various witnesses who talk
11 specifically about each one of the projects and
12 each one of the delays and each one of the
13 instances of either bad work or bad advice that
14 led to these -- that led to each one of the
15 discreet portions of the damages that Hobson is
16 entitled to.

17 You're suggesting that to the extent
18 that Hobson or SE/Z or anybody wants to come in
19 and say, This is a bad design, they can't do that
20 because they don't have an expert.

21 MR. STEFANIC: Well, anything with respect
22 to the professional conduct in this case.

23 THE COURT: Whether it is bad design or bad
24 advice.

25 MR. STEFANIC: That's exactly right. And,

1 Your Honor, we are suffering tremendous prejudice
2 from what the court is saying that it is about to
3 do to us.

4 THE COURT: Well, keep one thing in mind,
5 Mr. Oberrecht. When I read your memorandum in
6 opposition to the substantive issue of whether or
7 not the claim against the architect should or
8 should not be dismissed, you conceded in your
9 argument that, in your memorandum, that whether
10 you call this professional negligence or a breach
11 of contract, it doesn't make any difference.
12 Ordinarily yes, you do need an expert witness to
13 testify about the standard of care and their
14 opinion with respect to the breach of that
15 standard of care by that professional.

16 MR. OBERRECHT: Well, first off, the Idaho
17 Rules of Civil Procedure, and I know we've already
18 argued this, but I think I maybe arguing this
19 again, Your Honor, with all due respect, I haven't
20 been given enough time to respond to this
21 dispositive motion. I've been hit with it March
22 the 2nd. As I got that, that's 36 days before
23 trial starts.

24 Rule 56 says I get at least 60 days to
25 do that, and what we're talking about here now is

1 a dispositive motion. And the standard there is
2 whether or not there are material facts at issue
3 that the court should consider. And if there are
4 no material facts at issue, is there properly
5 under the law a ruling in favor of the movents.

6 And I have submitted to you, I have
7 submitted to you the evidence that we could put
8 together very quickly. I haven't had enough time
9 for that, and I do believe we're prejudiced
10 because of that. Having said that, I'll continue
11 my argument, though, Your Honor.

12 We were the only ones who didn't file a
13 motion. We were the only ones who followed your
14 direction. Everybody else here filed a motion,
15 and that doesn't make any difference to the court
16 when the court says, I'm going to take up every
17 one of these motions and let you argue them
18 substantively.

19 That puts me in a very bad position
20 procedurally. From a due process stand, we have
21 definitely been hurt.

22 Now, if you could, if you would
23 postpone the trial and say, Oberrecht, you've got
24 time to come back and respond to this properly
25 with plenty of time, as the rules would give you,

1 then okay, that argument of mine wouldn't be
2 there, but we've been prejudiced.

3 THE COURT: And I appreciate the sentiment
4 that you expressed.

5 Now, I would like you to address
6 another issue, Mr. Oberrecht, and that is
7 Mr. Stefanie's argument that not only should the
8 claims against Rudeen be dismissed, but that
9 absent some expert, anything having to do with the
10 work of that professional architect should not
11 come in.

12 MR. OBERRECHT: Okay. There are so many
13 issues that I need to be addressing to you right
14 now because the broad brush that you told us you
15 were painting with is an accurate brush, with all
16 due respect.

17 This is a precise brush that you need
18 to be painting with. Otherwise it's error,
19 Your Honor. We are in a terrible position now to
20 cover a very complex case that we said is going to
21 last for eight weeks. Now we're trying our
22 darnedest to cut it down as much as we can, and it
23 is a complex case. We have to be given the
24 opportunity to try our case.

25 THE COURT: Sure it is, and you will be.

1 And frankly, it's the duty of the court to make
2 sure that people get a fair trial.

3 MR. OBERRECHT: Right.

4 THE COURT: And part of that involves some
5 subjective judgment that I have to make along the
6 way that does sort of incorporate the court's view
7 of the case. I mean, I have to have a good handle
8 on the case conceptually so that I can prepare
9 proper jury instructions, and so forth.

10 One thing, Mr. Oberrecht, that I'm
11 intrigued by, and it's this whole question about
12 this total cost method versus I guess what I see
13 as sort of a more detailed presentation of the
14 allegations of additional expenses and money owed
15 and so forth. And that's going to involve -- it
16 seems to me that that's consistent with what
17 you've been telling me that we're going to have to
18 hear from the architects and the people who were
19 on the ground at the time to really explain your
20 claim for the setoffs and to refute the
21 contractor's claims why they're due all this extra
22 dough.

23 MR. OBERRECHT: I don't need to hear so much
24 from the architects. I've got my own witnesses.
25 I have a whole case to put on that Your Honor

1 hasn't seen yet. I have expert witnesses who are
2 going to come and talk about the deficiencies that
3 we discovered not before the termination for
4 convenience but afterwards.

5 We have a whole case that comes
6 afterwards, and it's not a retaliation claim that
7 we have here. It's a claim of breach of warranty
8 that we discovered only after the termination for
9 convenience. And I will get into that,
10 Your Honor.

11 THE COURT: Well, I seem to recall that
12 there were things -- didn't some of that evidence
13 sort of come out at either at the last trial or
14 prior to the last trial regarding -- and I'm not
15 trying to minimize it by any stretch of the
16 imagination, but weren't there some things
17 involving the paint and so forth in some of the
18 rooms?

19 MR. OBERRECHT: Yes. There are numerous,
20 numerous issues.

21 THE COURT: And those are the kind of things
22 that you discovered after.

23 MR. OBERRECHT: Yes, absolutely. But,
24 Your Honor, I have to do some detail work with
25 you. The cross claim that was filed against us by

1 SE/Z talks in very specific terms of defective
 2 specifications, defective specifications; not a
 3 failure of any of the other obligations of the
 4 architect to the state, defective specifications.
 5 And even though the court remembers
 6 that it granted a directed verdict on the basis
 7 of, this is a malpractice action and you don't
 8 have an expert witness, Hobson, to bring an action
 9 against an architect on defective specifications,
 10 that wasn't the motion that was filed.
 11 The motion that was filed was that
 12 there was no cause of action for defective
 13 specifications, which means an implied warranty
 14 that the specifications are good coming from
 15 Hobson to anybody, because the Supreme Court has
 16 ruled in Newby-Wiggins against Gillingham that the
 17 implied obligation that the owner has to the
 18 general contractor SE/Z, that the specifications
 19 and plans will be appropriate and good, does not
 20 flow down to a subcontractor.
 21 So the court, even though the court
 22 talked in terms in part of, Well, I didn't see an
 23 expert witness here either talking about the
 24 defective plans and specifications, the essence of
 25 that motion where Hobson was concerned was there's

1 no cause action there. And then the court went on
 2 to say, and we will not allow a pass-through of
 3 Hobson's nonclaim on defective specifications, to
 4 get to the state through SE/Z.
 5 However, however, nobody has said
 6 anything yet that SE/Z does not have a claim for
 7 defective specifications. Where is that motion?
 8 The state is still faced with a defective
 9 specification claim under an implied warranty
 10 coming from SE/Z. That's one issue.
 11 The second issue, Your Honor, is that
 12 when we were sued for defective specifications by
 13 our architect, we were also sued for breach of
 14 contract based on those defective specifications
 15 and a failing or refusing to cooperate with SE/Z
 16 and its subcontractors.
 17 Now, a failing and refusing to
 18 cooperate with SE/Z and its subcontractors doesn't
 19 have anything to do with defective specifications.
 20 And SE/Z is going to make that claim against us
 21 and certainly did at the last trial.
 22 We don't need an expert to prove
 23 failure of cooperation and refusing of cooperation
 24 by the architect. That's something that everybody
 25 on a jury can understand. A failure or refusal of

1 cooperation.
 2 They're all going to understand it when
 3 they make the claim against the state, and they're
 4 all going to understand it when we make that claim
 5 against the architect. That's an exception.
 6 In addition to that, Your Honor,
 7 although Mr. Henry is very good being a former
 8 HVAC man himself, at talking about the
 9 technicalities of solenoid valves, it's not the
 10 solenoid valves that are going to be the issue.
 11 Everybody agrees and we'll agree in the
 12 documentation and in the testimony that there was
 13 a screw up over determining what solenoid valve
 14 should be used.
 15 The issue, the issue is that there was
 16 too much time taken up with resolving this. And
 17 so even though SE/Z doesn't have a claim over
 18 against the state for defective specification with
 19 respect to the solenoid valves, it has a claim
 20 that it took us too long to resolve these issues;
 21 we weren't cooperating.
 22 Why weren't we cooperating? Our
 23 architects weren't cooperating, and therefore,
 24 we're going to get hit with these delay damages.
 25 And we say, Hey, this isn't something

1 extraordinary that is going to take an expert to
 2 explain. That's failure to cooperate, and we
 3 should be allowed to put our proof on with respect
 4 to that, just like you allowed in the last case
 5 SE/Z and Hobson to put their proof on, that they
 6 were delayed because of failure to cooperate and
 7 refusal to cooperate.
 8 You'll remember, Your Honor brought
 9 this up, the makeup air units, big heavy makeup
 10 air units, 9,000-pound makeup air units. Well, if
 11 you'll recall, Your Honor, the issue with the
 12 makeup air units is not whether or not they should
 13 have brought in a structural engineer to determine
 14 what the columns would or would not have
 15 supported.
 16 The issue was, when they decided that
 17 they were going to change from a 7,000 -- I'm
 18 using rough figures here -- 7,000- to a
 19 9,000-pound makeup air unit, what they discovered
 20 is not that the platform wouldn't hold up an extra
 21 2,000 pounds of makeup air unit. What the
 22 architect discovered was, Oh, my gosh, my
 23 structural engineer failed to design these columns
 24 to support anything except the platform itself.
 25 And so if we would have come forward

1 with a 7,000-pound makeup air unit, which was
 2 originally specified, it wouldn't have worked.
 3 It's not going to take a jury listening to experts
 4 to ascertain that when the architects agree with
 5 the contractors that, Oh, my gosh, we didn't take
 6 into account any additional weight in making those
 7 columns, and now we have to go back and spend the
 8 time and get somebody in here, hire them, to have
 9 structural engineers to come in and do this, blah
 10 blah blah blah, it took time.

11 And the contractors say, Guess what,
 12 State of Idaho, you have to pay for our extra
 13 time. That is a delay that was caused by you and
 14 your people. I don't need an expert for that.
 15 Every juror is going to understand that,
 16 especially people who have a house, Your Honor.
 17 And they go out and get a house inspector, and the
 18 house inspector says, Whow, these columns aren't
 19 any good here. Structurally, that's not going to
 20 be any good.

21 What do they understand from that? Not
 22 the technicality of how to design a structure, but
 23 my goodness, I have a defect in my house. It was
 24 caused by somebody. I need help.

25 Finally, Your Honor, contract

1 show is it was a money issue, why she wouldn't
 2 come down; not that the state ordered her to stay
 3 up there.

4 Now, does it take an expert for us to
 5 have to prove that the architect caused these
 6 delay issues, not the state? No, not at all.
 7 Every juror is going to understand that. Why
 8 didn't Traci Hanegan come down? It was a money
 9 issue. They wanted to be paid for it. There was
 10 convoluted problems going on. They didn't want to
 11 send Traci down. That caused them problems.

12 Now, here is the total cost issue that
 13 you were talking about, and I'll try to tie it in
 14 now.

15 If you allow these gentlemen to prove
 16 their damages by the total cost approach, we've
 17 got a lot of things we need to talk about. And
 18 I'm going to sit down and then get up a little
 19 later and talk about what the measure of damages
 20 is.

21 But right here the dilemma that you are
 22 placing the state on, Your Honor, is I think
 23 you're inclined to say, Well, Hobson and SE/Z, you
 24 aren't allowed to get into defective
 25 specifications. But anything else the agent, the

1 administration. There is one part, and Your Honor
 2 may remember this testimony. I've had to focus on
 3 some of this testimony as quickly as I could to
 4 bring it up. But one of the bits of testimony
 5 that I remember is that it was Mr. Frisbee,
 6 Ted Frisbee, testified: When we were doing our
 7 balancing -- we had a lot of testimony,
 8 Your Honor, about confusing balancing and how
 9 difficult that was. That's going to require
 10 experts, and we've got experts coming in to talk
 11 about that.

12 But the issue that Mr. Frisbee was
 13 raising that I'm going to talk about here is not
 14 that, Hey, look how complicated this balancing was
 15 and they didn't design it in such a way that we
 16 could balance it right so we had to get this guy
 17 to explain this balancing.

18 What he said was Traci Hanegan, who was
 19 the mechanical engineer hired by the architects,
 20 wouldn't come down from Spokane and talk to us.
 21 We tried to get this thing balanced, and we had
 22 issue after issue, and we said, Bring Tracy down
 23 here.

24 And Tracy refused to come down.

25 And the evidence that we're going to

1 architect for the state, did is fair game for you,
 2 and you don't need an expert for that. And you
 3 know what? All you might have to do is say, Geez,
 4 you've got all this is damages, and they may be
 5 caused by lots of different things, like for
 6 example, the architect saying, Ooh, we've got to
 7 go and redesign that because we forgot to design a
 8 structure so that it would hold it up. Or, Geez,
 9 we didn't come down and try to help you on this so
 10 now it took you a lot longer to do that. We
 11 failed to cooperate. But do you see where I'm
 12 going with that?

13 And if they get to come after the state
 14 for this under my complaint, I didn't say, Hey,
 15 this is just your design, and you need to defend
 16 it. I said, We've got a contract, and you had to
 17 design this and you had to do contract
 18 administration. You had other obligations.

19 And it's not the defective spec
 20 anymore. It's not the design that we're talking
 21 about. It's those other obligations, that I think
 22 Your Honor is going to be inclined to allow them,
 23 to bring on evidence of, and try to claim damages
 24 against the state for.

25 If you do that, we have to be able to

1 do the same thing they're going to do to us and
 2 turn to the architect and say, Hey, guess what?
 3 This is one of the things you were doing for us.
 4 I guess it's, good for the goose, good
 5 for the gander argument, and I don't think we need
 6 experts for that.

7 THE COURT: Thank you. Mr. Stefanic?

8 MR. STEFANIC: Yes, Your Honor. I have to
 9 respond to a couple of those points.

10 First of all, it is not a dispositive
 11 motion. It's a motion in limine that has an
 12 effect of this. And the deal is, the state or
 13 SE/Z or Hobson had years to get experts to testify
 14 against us about the standard of care, and they
 15 didn't.

16 And Mr. Oberrecht's argument highlights
 17 the fact here that what we have is very good solid
 18 law in Idaho that says if you bring a cause of
 19 action against a design professional or a
 20 professional of some sort, you have to have expert
 21 testimony. There's no experts whatsoever, and
 22 we've talked about whether it was in the ordinary
 23 knowledge of a juror or not from at least the
 24 state's perspective.

25 We have a situation here where you have

1 good Idaho law on that issue, expert testimony is
 2 needed, and then you have the state and you have
 3 Hobson and SE/Z trying to contract around that.
 4 And they've entered into a contract where they
 5 have this termination for convenience clause, and
 6 they have damages which flow around that.

7 You're talking about due process, it's
 8 against every due process right of Rudeen and the
 9 design team, because of that contract, nobody has
 10 to come forward with proof of an expert against
 11 them. So what I'm saying is, you don't even get
 12 to the contribution issue. You don't get to the
 13 indemnification issue. You don't get to the third
 14 party complaint issues because there has not been
 15 an expert to testify about all these things that
 16 would trickle down to the state who in turn would
 17 turn around to us. That is a contract between
 18 these fellows here; not us.

19 So that's very critical here. We
 20 weren't parties to that contract. We have a right
 21 that if somebody is going to criticize our
 22 performance on the job, whether you term it
 23 contract administration, design and defects or
 24 whatnot, they have to come forward with an expert.
 25 This is not simple stuff. This deals with

1 professional judgment. This deals with whether
 2 things are in the appropriate fashion to come down
 3 to take on balancing of whatnot, whether things
 4 have been done that were suggested.

5 It has a lot to do with professional
 6 judgment, and I do not think that ordinary jurors
 7 would grasp this particular issue. Your Honor.

8 THE COURT: Thank you.

9 Mr. Henry?

10 MR. HENRY: Round two, Your Honor?

11 THE COURT: Yes. Well, actually, you get
 12 the final word since it's your motion.

13 MR. HENRY: Thank you, Your Honor.

14 A couple things. I'm disturbed by the
 15 characterization that this is somehow some ambush
 16 that we've done. We filed these motions on the
 17 2nd. We had conversation with Your Honor on the
 18 5th. The state asked for more time. Your Honor
 19 suggested seven days. I had an arbitration in
 20 Seattle yesterday, so they got yet an extra day.

21 I don't understand the handwringing
 22 about the fact that these motions, that an
 23 inadequate amount of time to brief these motions
 24 in limine was a problem.

25 We had two days to do the reply, a day

1 really because I had to get it here from Seattle.
 2 So I think that adequate times have been provided,
 3 and that's not even a consideration.

4 Another thing that has been completely
 5 omitted here is the fact that the architect got
 6 terminated in this matter too. It wasn't just the
 7 contractors that got terminated; the architect got
 8 terminated. And in regard to the fact that
 9 there's some breach of warranty claim being tried
 10 here, how do you warrant a contract that you've
 11 been terminated from? You don't have warranty
 12 responsibility after you've been terminated.
 13 You're done.

14 And the fact of the matter is, the
 15 contract is over. Your Honor has decided that the
 16 counterclaim of the state survives based on some
 17 specific contract language in Article 13. It's
 18 not about whether or not the warranty was
 19 breached. Clearly, you can't warrant a project
 20 you never finished.

21 So I don't understand that. We are at
 22 a point here, Your Honor, where I think it's about
 23 as clear as we can make it. No expert. Got to
 24 have an expert. Mr. Oberrecht's descriptions to
 25 the contrary, I simply see Your Honor that you're

1 going to have problems with lay people here
 2 talking about these things and whether an
 3 architect did something on time, whether they
 4 didn't do something on time, what the expectations
 5 were; whether or not you can make a claim after
 6 you've terminated somebody from a contract. All
 7 those kinds of things are going to come in if
 8 Rudeen stays in this case. It's going to make it
 9 extraordinarily complicated, and we think it's
 10 pretty simple: You've got to have an expert to
 11 prove professional negligence. That's it.

12 THE COURT: Fair enough. Thank you.

13 I think I've heard from everybody on
 14 this issue. So what is fully under advisement as
 15 of this moment, and I am going to give you my
 16 answer on this question before we break today, is
 17 the issue of the motion to dismiss Rudeen. So
 18 I'll make my ruling on that after I gather my
 19 thoughts a little here, and then I'll come back
 20 in. Then we'll take up the other issues that are
 21 set forth in the four motions in limine.

22 So let's take a little break.

23 MR. HENRY: Your Honor, may I just ask, in
 24 regard to this, if Your Honor determines not to
 25 dismiss Rudeen, are we then going to argue the

1 it up.

2 But I want to be able to articulate as
 3 best I can why I'm going to do what I'm going to
 4 do with Rudeen. And I'll tell you, and I don't
 5 think it will come as any surprise when I grant
 6 the motion to dismiss the causes of action against
 7 Rudeen.

8 But I want to come back in and
 9 articulate that a little bit better in about
 10 10 minutes, so let's kind of regroup, catch your
 11 breath, and then I'll come in and announce that
 12 decision formally. And then I will take up these
 13 other issues.

14 I guess what I'm telling you is, I
 15 don't want to promise you that I will rule from
 16 the bench. I'm not sure how long this argument is
 17 going to go, and I have a little extra time now
 18 because the jury trial that we started this
 19 morning ended up with a guilty plea halfway
 20 through our voir dire.

21 So I was going to be tied up with that
 22 jury trial the next couple of days, and now I have
 23 the luxury of being able to digest these arguments
 24 that I'm getting today and be able to write my
 25 decision on the other four issues.

1 fourth motion in limine?

2 THE COURT: No. What I'm going to do, when
 3 you say the fourth motion in limine --

4 MR. HENRY: That's the one that Rudeen has
 5 brought.

6 THE COURT: Yeah. I'm going to rule on
 7 Rudeen's motion, and I'm going to rule on your
 8 motion to dismiss Rudeen. And then we'll come
 9 back in here in 10 minutes, and I actually have
 10 advised the staff that we'll have a little bit --
 11 to plan on being here a little bit after 5:00
 12 today, because I want to have it out on some of
 13 these other issues.

14 And with respect to the other issues,
 15 what I will probably do I think is give you a
 16 written decision on those four remaining issues
 17 after we dispose of Rudeen today.

18 MR. OBERRECHT: Will you tell us how you're
 19 going to rule on them, though? We're two weeks
 20 from trial.

21 THE COURT: As best I can, yeah. I hope
 22 that some of the comments that I've made thus far
 23 when I was giving you my broad brush look at this
 24 thing gives you some sense of that. I'll be more
 25 specific obviously, and that's why I want to write

1 So let's take a break for 10 minutes.

2 We'll come back in, and I'll announce my decision
 3 on Rudeen, and then we'll take up the other
 4 issues. That's it.

5 (Recess 4:40 p.m. to 4:55 p.m. taken.)

6 THE COURT: The motion to dismiss the
 7 indemnity claim against Rudeen is granted. And
 8 what I think I'll do is, because you folks need to
 9 know all of these things pretty quick, at the end
 10 of today's arguments on these four motions in
 11 limine, I'm going to make -- I hope I'm going to
 12 be able to tell you what I'm going to do just in a
 13 word.

14 And then I will give you a written
 15 decision so everything is pretty clear by the end
 16 of the day tomorrow, and I can fax it out to you.
 17 Fair enough?

18 MR. OBERRECHT: Thank you.

19 THE COURT: Mr. Stefanic?

20 MR. STEFANIC: Your Honor, real quick. You
 21 keep referring to just the indemnity claim, and I
 22 wanted to make sure it was the entire third party
 23 complaint, that includes the breach of contract
 24 indemnity and contribution claim.

25 THE COURT: Yes.

1 MR. STEFANIC: And that's with prejudice. I
2 apologize.
3 THE COURT: What if it isn't?
4 MR. STEFANIC: Well, right now is the time
5 for experts to come forward. We're here. We're
6 ready. And it should be --
7 THE COURT: Well, even at that, if I
8 dismissed it without prejudice, nobody could bring
9 a claim against you anyway at this point because
10 it has been more than two years.
11 MR. STEFANIC: I'm not sure that is
12 necessarily true, Your Honor, because at the
13 point, if evidence comes in, I'm not sure I can
14 analyze that. The point is, we're here now.
15 THE COURT: Are you thinking that there
16 could be an argument that the cause of action
17 didn't accrue --
18 MR. STEFANIC: Yeah.
19 THE COURT: -- until the state was ordered
20 to pay for something that they come back and claim
21 you did?
22 MR. STEFANIC: Absolutely.
23 THE COURT: It is dismissed with prejudice.
24 That will do it. They're out.
25 Now, the other arguments, I'm taking

1 them up. We've got in quite a bit of substance
2 already I think, and I think I've told you the way
3 I'm leaning on all of these things. What do you
4 think is the most important one of the four that
5 you have, Mr. Henry?
6 MR. HENRY: Well, Your Honor, which of the
7 kids is the most important to you?
8 I can't say that, Your Honor. I think
9 that all of them are important. I think the first
10 three may have some of the same ultimate effect,
11 and I think the last one is very important for
12 Your Honor to hear.
13 THE COURT: The total cost issue?
14 MR. HENRY: I think it's really important
15 because the plain language of the contract, and we
16 want to go over that with you very carefully
17 today.
18 THE COURT: Our time limit.
19 MR. HENRY: I can spend the night, Your
20 Honor, if you've got nothing to do. Same suit,
21 sorry.
22 THE COURT: The point is, the court has
23 reviewed all of the material that has been
24 submitted by the parties thus far. The purpose of
25 the oral argument is to hit the high points I

1 think or if you think -- and again, I've done my
2 best to try to give all of you an idea of what I'm
3 thinking so that you can see if you think I'm
4 missing an important point, you can highlight that
5 during your argument.
6 I want to give -- folks, do you think
7 if I gave every party -- well, there's only three
8 parties left. I'm going to give each of the
9 remaining three parties 15 minutes, and we're
10 going to leave here, then, at a quarter 'til.
11 Yes, sir?
12 MR. OBERRECHT: Your Honor, you indicated
13 that you had given an indication of where you're
14 leaning on the other motions. I'm not sure I
15 picked that up.
16 THE COURT: Well, let me kind of suggest
17 this. There was one of the motions in limine
18 touched on the question of whether or not the
19 court's rulings on the three change orders, I
20 think it was 10, 12, and 13?
21 MR. OBERRECHT: Right.
22 THE COURT: Whether or not those were going
23 to apply with equal force to all of the other
24 change orders, and I think there was something
25 like 15 other change orders?

1 MR. OBERRECHT: 19.
2 THE COURT: 19 more? Whether or not the
3 same reasoning would result in the same ruling as
4 the evidence is developed during the trial. And
5 the answer is yes. That's what I'm thinking.
6 And whether or not that the rulings
7 that the court has made with respect to those
8 change orders will be -- will apply equally to any
9 party that has waived -- I guess I'm thinking
10 yeah, I mean that would make sense to me. But
11 again, that's why I want to hear what you folks
12 have to say. Maybe you should tell me that no,
13 things could be otherwise.
14 What I foresee possibly happening at
15 the trial is that the parties do their best to
16 narrow the focus of what these change orders
17 really did and not to read them too broadly, and I
18 realize I have to be really clear on my rulings on
19 these change order issues because while I will
20 rule consistently with the way I ruled on those
21 other three change orders, it could very well be
22 that parties will argue during the trial that
23 certain evidence which appears to me to be
24 irrelevant, because they're related to these
25 change orders, aren't so closely related to these

1 change orders after all. And that's the reason
2 why I want to sit down and write them out very
3 carefully.

4 MR. OBERRECHT: How about notice? We can't
5 bring a claim because we haven't given notice.
6 You've already ruled on that. Are you planning on
7 denying yourself?

8 THE COURT: No, I'm not.

9 MR. OBERRECHT: Your Honor hasn't even heard
10 argument yet.

11 THE COURT: Exactly.

12 MR. OBERRECHT: I'm just asking for your
13 inclination.

14 THE COURT: Exactly.

15 No, Mr. Henry, what Mr. Oberrecht is
16 referring to is, I made a representation a second
17 ago that I had made some comments which were
18 intended to give the parties an idea of what I was
19 thinking before you give me your arguments here
20 today.

21 And Mr. Oberrecht said I'm not so sure
22 I really picked up on the way you're thinking on
23 some of these issues, and so he brings up this
24 issue of notice and opportunity to cure and
25 suggests that inasmuch as I already ruled on that

1 issue previously -- at least that's his
2 argument -- that --

3 MR. OBERRECHT: No, that's just my question.

4 THE COURT: Right on, exactly.

5 MR. OBERRECHT: But what about the T for C,
6 then, that we can bring any claims or offsets or
7 counterclaims or defenses because there's a T for
8 C?

9 THE COURT: No. I'm not ordering --

10 MR. OBERRECHT: That's one of the motions.

11 THE COURT: Yeah, I know.

12 MR. HENRY: It's not one of the motions.

13 THE COURT: Well, I want to make it as clear
14 as I can that, and for your benefit and for the
15 benefit of all counsel, the suggestion that the
16 state would be precluded from defending these
17 claims because of failure to give the notice and
18 opportunity to cure, the seven-day notice and
19 opportunity to cure, I have touched on that
20 question previously.

21 And I think that to rule today that the
22 state would not be allowed to pursue any setoffs
23 or otherwise in any way defend the claims of the
24 contractors who claimed they're owed a lot of
25 money would amount to reversing my previous ruling

1 on the issue.

2 Now, I'm saying that before I've heard
3 your argument. I'm saying it for the benefit of
4 Mr. Oberrecht who has asked me specifically what
5 I'm thinking right now, and this isn't my ruling.
6 It's intended to focus your argument.

7 MR. HENRY: Understood.

8 THE COURT: Fair enough?

9 MR. HENRY: Fair enough.

10 THE COURT: Okay. I'll give you 15 minutes,
11 counsel.

12 MR. HENRY: 15 minutes to go through four
13 motions in limine. No, no. It's fine,
14 Your Honor, absolutely.

15 What is good for the goose is good for
16 the gander, and that's the theme of the first
17 motion in limine, Your Honor. Your Honor has
18 decided on the issues of change orders, the
19 preclusive effect, the fact that Article 7.2.3 of
20 the general conditions indicates that by executing
21 it, it's a full and final settlement of all
22 matters relating to or affected by.

23 THE COURT: And you agree, counsel, that I
24 have made that ruling.

25 MR. HENRY: Twice.

1 THE COURT: And that is the law of the case?

2 MR. HENRY: That is the law of the case.

3 And consequently, Your Honor, we think it's only
4 fair that Your Honor extend that to change order
5 number 9 and change order number 13, one of which
6 you have actually already ruled on. Your previous
7 rulings indicated that the preclusive effect was
8 as to the contractors.

9 And what we think Your Honor meant was
10 that it's preclusive, it's preclusive to even the
11 parties. The substance of change order number 9
12 was the alleged deficient welding of stainless
13 steel duct.

14 THE COURT: Well, let me ask you this.
15 Which of the three that I've ruled on already?

16 MR. HENRY: 10, 12, and 13, and we're asking
17 Your Honor to extend the preclusive effect of
18 Your Honor's previous rulings, ruling on 13 to the
19 state, and we're asking Your Honor to adopt the
20 law of the case as to change order 9, precluding
21 any party from making any further claim in regard
22 to the issue of stainless steel duct welding.

23 THE COURT: Just on change order 9?

24 MR. HENRY: You've already ruled on 12,
25 which is the other stainless steel duct welding.

1 and we believe your order, if you're going to
2 grant this motion in limine as you're indicating
3 you will, will say that the preclusive effect is
4 as to all parties.

5 Obviously we were not signatory, but by
6 virtue of the fact that we're tied to the main
7 contract through our subcontract with SE/Z, it's
8 of the same effect.

9 THE COURT: Mr. Henry, as I remember
10 Mr. Anderson's -- wasn't it Mr. Anderson's motion?

11 MR. HENRY: It was Mr. Anderson's motion.

12 THE COURT: And I think he said there were
13 some 15 different change orders that he wanted me
14 to rule on then and there, and I'm told today that
15 all told there were 19?

16 MR. HENRY: I think there probably were 19,
17 Your Honor. Our motion in limine was simply as to
18 change orders 9 and 13.

19 THE COURT: I think I have every one of
20 those change orders already in the record.

21 MR. HENRY: And certainly these two are part
22 of my affidavit.

23 THE COURT: Right. And again, Mr. Henry, my
24 thought is, well, if all of these change orders
25 are -- the same language, if they all contained

1 I think the question is going to be,
2 well, just because we entered into a change order
3 with respect to the ductwork in -- this particular
4 ductwork issue, that doesn't mean that all
5 ductwork is necessarily covered by that one change
6 order. Right? I mean, isn't that where we're
7 going?

8 MR. HENRY: Well, the stainless steel
9 exhaust ductwork is one system within the
10 laboratory. That's it. There's one exhaust
11 system that involves stainless steel ductwork. So
12 there would be no other -- there's other ductwork
13 in the building, but as to what's the subject
14 matter of change order 9, the point is, no party,
15 including my own client, can make a new separate
16 claim or can put on evidence of being owed any
17 more money other than that that was settled by the
18 change order.

19 THE COURT: Yeah. I suppose that not all 18
20 or 19 change orders are going to be argued about.
21 Maybe there will just be a couple of them that we
22 really have to focus on.

23 MR. HENRY: Okay. So I think we can move on
24 from that one unless Your Honor has further
25 questions.

1 the same waivers, and so forth, I find it
2 difficult to believe that I would rule
3 differently. Do you know what I mean?

4 MR. HENRY: I understand.

5 THE COURT: And I don't know that I would
6 just say, well, only with respect to number 9. Do
7 you see what I mean?

8 MR. HENRY: That's fine, Your Honor. I just
9 want to point out that our motion in limine was
10 only as to change orders 9 and 13. What
11 Your Honor decides to do with regard to your
12 previous determination of the law of the case is,
13 you've got the discretion to do that.

14 THE COURT: What I might be able to do on
15 that issue is -- and you folks will all need this
16 guidance when you get ready to present your
17 evidence because there going to be objections as
18 to relevance and whether or not a party is allowed
19 to present evidence on something that might be
20 touched by a change order -- I'll make that as
21 clear as I can that the rulings that I've made
22 with respect to the change orders that I have
23 settled, number 10, 12, and 13, apply with equal
24 force to all parties to those change orders, but I
25 think the devil is going to be in the details.

1 THE COURT: No. So far so good.

2 MR. HENRY: I would be happy to answer those
3 after everybody has spoken.

4 I think the second and third motions in
5 limine, the ones that we've categorized for
6 Your Honor in our reply brief as the all-in or
7 all-out portions of these motions in limine
8 indicate that one of two things happened here.

9 When the contract was terminated on
10 June 3, 2005, the day that Pam Ahrens put pen to
11 paper and signed that, it ended the contract
12 completely. And Your Honor, though, has ruled as
13 a matter of law that there were provisions in the
14 contract that apparently survived the termination
15 and that gave rise to the state's counterclaim.

16 And our contention is, as Your Honor
17 has seen, Your Honor refused or declined to adopt
18 the line of cases from New York Shipbuilding, the
19 board of contract appeals cases that were
20 presented on summary judgment to Your Honor, that
21 say if the government terminates for convenience,
22 it's not entitled to a counterclaim.

23 Your Honor said that there were
24 questions about those holdings and that they
25 hadn't been adopted in Idaho and consequently they

1 weren't informative to Your Honor and they weren't
2 persuasive authority for Your Honor to grant a
3 motion based on them.

4 And in response, one of the things
5 we've said now in our second motion in limine is,
6 Well, fine, in regard to New York Shipbuilding,
7 but in regard to the Black Letter Law, Your Honor,
8 that the state has adopted dozens and dozens and
9 dozens of times, the treatise authority, the
10 hornbook authority, says when a contract is
11 terminated, it ends as a matter of law.
12 Consequently, if it ends as a matter of law, it
13 must be all out after the termination, meaning as
14 to continued enforceability.

15 However, Your Honor has found now in
16 this case as a matter of law that at least some
17 portions of it give rise apparently presuming that
18 the state can put on evidence at the trial that it
19 complied with the notice provisions, because
20 that's what Your Honor's ruling says.

21 THE COURT: Or is relieved from the
22 requirement to comply with the notice provisions.

23 MR. HENRY: Or somehow it was waived. And
24 Your Honor specifically focused in that motion for
25 summary judgment on notice that arises under

1 any distinction, Mr. Henry, between the claims
2 that the state -- the claims that some of the
3 defective work was you folks' fault prior to
4 June 6, 2005 and after the contract terminated?

5 Mr. Oberrecht has suggested that once
6 they started doing the remedial work after June 3,
7 2005, they uncovered defects and all kinds of bad
8 things that cost them a lot more money. Is there
9 a distinction there?

10 MR. HENRY: Well, certainly there is,
11 Your Honor, because they terminated the contract
12 for convenience. They did not terminate it for
13 cause. They did not reserve -- despite the fact
14 that they wrote some kind of a letter that says,
15 There are additional costs here, and we're not
16 waiving something in regard to them.

17 The letter says, You're terminated for
18 convenience. It doesn't say, You're terminated
19 for default. It doesn't say, You're terminated
20 for cause. It doesn't list any deficiencies. It
21 doesn't provide a seven-day opportunity to cure.
22 It doesn't provide a three-day opportunity to
23 cure. It provides goose egg except for the fact
24 that the contract is over.

25 And now to come back after the contract

1 Article 13, the claims provision in the contract.

2 And we've said, But, Your Honor,
3 there's more than just the notice provisions under
4 the claims provision of the contract. Claim is a
5 defined term in this contract. Your Honor has
6 already said it's clear and unambiguous, define
7 terms after being taken by their plain meaning.

8 And claim is an issue, and I think
9 that -- actually Mr. Hahn may talk to you a little
10 bit about claim, but our motion focused on the
11 fact, Your Honor, that a separate requirement --
12 if the contract isn't all out, then it is all in,
13 and it's all enforceable. And the parties
14 reciprocal duties to each other continue to exist
15 after the date of the termination.

16 And included among those is the
17 takeover provision in Article 2, 2.4.1, that says
18 that the state can't take over the work and charge
19 the contractor, in this case SE/Z and by force of
20 our subcontract Hobson, for corrective or
21 completion work unless it provides the notices
22 that are required, the seven-day notice of
23 deficiencies, the three-day notice, and the
24 opportunity to cure, three things.

25 THE COURT: Let me ask you this. Do you see

1 is over with no opportunity to correct the work
2 that is now alleged to have been deficient, simply
3 put, Your Honor, you can't do it because you've
4 got if the contract survives, you have obligations
5 under the agreement, under the plain language of
6 the agreement, to comply with it.

7 It's not just the fact that you can
8 pick out the five provisions in the contract that
9 the state cited in opposition to the motion for
10 summary judgment and ignore the rest of them.
11 This isn't a salad bar. This is a contract.

12 THE COURT: Well, I see a big distinction
13 between pre June 3, 2005 defects and post June 3,
14 2005 defects.

15 MR. HENRY: But the question becomes,
16 Your Honor, then, how can you hold a contractor
17 whom you've terminated, who has no opportunity to
18 correct that work at its own cost and with its own
19 efficiency, how can you then simply open your
20 checkbook up to third parties and say, Spend
21 whatever it takes and we'll go sue them.

22 THE COURT: Understood. Now, doesn't that
23 argument apply with different force to the post
24 June 3, 2005 work?

25 MR. HENRY: I'm not sure.

1 THE COURT: Well, I guess what I'm saying
2 is, this whole business of notice and opportunity
3 to cure makes a lot more sense on the defects that
4 were discovered by the state allegedly post --

5 MR. HENRY: I think I'm following
6 Your Honor. And what you're saying is, once those
7 alleged deficiencies were discovered, would it
8 have been incumbent upon the state to provide the
9 notices, I guess except for the problem is, the
10 contract I think, if we're looking at the hornbook
11 law here, the contract doesn't exist anymore. And
12 the testimony that we've excerpted for Your Honor
13 from Jan Frew, the deputy administrator in the
14 Division of Public Works, indicated they weren't
15 going to let Hobson and SE/Z back on that job
16 site.

17 They said, You're not under this
18 contract anymore. That was her testimony. That's
19 perfectly consistent with the hornbook authority
20 that we've provided Your Honor, that once the
21 termination letter went out, there was no more
22 contract. Nobody was under the contract anymore.

23 And it's very difficult to say that
24 even if the contract somehow survived the
25 termination, that the state had an obligation --

1 are in the record and, of course, which are now
2 acknowledged in the deposition testimony not to
3 have ever been done by DPW.

4 So with those in mind, Your Honor, it
5 would be highly prejudicial to allow a jury to
6 hear testimony about the fact that work was
7 discovered to have been somehow deficient.

8 THE COURT: After June 3.

9 MR. HENRY: After June 3, 2005, and that no
10 list of the deficiencies were provided, that no
11 notices were provided, no opportunity to cure were
12 provided, and then say, By the way, we spent
13 \$3 million fixing this, and it's these people's
14 problem.

15 THE COURT: I understand.

16 MR. HENRY: And that makes a very difficult
17 situation.

18 On now to the last and final one.

19 Whether or not the contract allows the recovery of
20 both SE/Z and by virtue of the subcontract Hobson
21 to claim their termination for convenience damages
22 on a total cost basis. And I draw Your Honor's
23 attention to the language in the contract.

24 14.1.3, as Your Honor will recall, the
25 termination for convenience clause was changed by

1 and I think that it would be correct to say, if it
2 survived and those portions -- all the portions of
3 the contract remain enforceable after June 3,
4 2005, that the state had that obligation under
5 2.4.1 upon the discovery to provide the notice and
6 opportunity to cure.

7 Clearly it didn't do that. There's no
8 evidence before the court that it did. And
9 consequently, in regard to our either/or -- it's
10 either all in or all out -- under either of those
11 scenarios, the court should limit the evidence
12 that is being able to be presented to this jury
13 that would assert that the contractors are somehow
14 responsible for the state's additional costs of
15 completing the work when there was no compliance
16 with a prerequisite requirement of the contract
17 that would allow them, A, to take over the work at
18 all, and second of all, to charge the contractors
19 back for it.

20 And this is the plain language of the
21 agreement, Your Honor. And this isn't some
22 fantastical thing where they can say that there
23 was perhaps some kind of constructive notice
24 provided. These are specific requirements that
25 require specific written notices, none of which

1 the owner in the general conditions to reference
2 section subparagraph 14.1.3 of the agreement,
3 which normally would be the section in which under
4 the AIA 201 1997 general conditions, which would
5 be the section that the contractor could invoke if
6 the owner had done something wrongful in order to
7 terminate, and that would then dictate the amount
8 of damages. And I'll quote from it, Your Honor.

9 "If one of the reasons described in
10 paragraph 14.1.1 exists, the contractor may, upon
11 seven days' written notice to the owner and
12 architect, terminate the contract" -- none of that
13 is applicable because the contract had already
14 been terminated. And here is the damages -- "and
15 recover from the owner payment for work executed,"
16 work with a capital W, "and for approved loss with
17 respect to materials, equipment, tools,
18 construction equipment, machinery, including
19 reasonable overhead and profit." That's the clear
20 and unambiguous language of the contract, work
21 with a capital W, is a defined term.

22 "Work as used in this provision is
23 defined as the construction services required by
24 the contract documents, whether completed or
25 partially completed, and includes all other labor,

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<p>1 materials, equipment, and services provided, or to 2 be provided by the contractor to fulfill the 3 contractor's obligations." 4 The important things there, Your Honor, 5 are all other labor, materials, equipment. Work 6 is a defined term, and what it says here, 7 Your Honor, is that the contractor upon the 8 termination for convenience is entitled to recover 9 from the owner the cost of the work executed. 10 That's a total cost, Your Honor. 11 That's actual cost. It doesn't matter. As I have 12 pointed out in the reply brief, Your Honor, the 13 authority, as Your Honor saw, the state's 14 opposition cited federal and foreign authority in 15 regard to the fact that total costs are disfavored 16 in the law and all that. 17 That's great except for here they were 18 contracted for. They may be disfavored, but 19 they're contracted for. And I've provided 20 Your Honor with a number of citations to in fact 21 some of the same courts that were cited that say 22 upon the termination for convenience, the 23 contractor is entitled to its actual cost. The 24 plain language of this says the exact same thing. 25 So our contention is, Your Honor, that</p>	<p>1 already determined the plain language here 2 controls. We think that, Your Honor, when he 3 looks at that provision and he looks at the 4 definition of work with a capital W, won't have 5 any option but to agree with us that work 6 executed, work being all labor, materials, 7 equipment. And supplies means that the measure of 8 damages here is a total cost. 9 It is very close to what Your Honor 10 said in his colloquy about how you see this thing 11 going. When you terminate for convenience, the 12 contractor sends his bill. The purpose of a 13 termination for convenience in regard to a 14 governmental contract is out there, and we've 15 provided the authority. The purpose is, that if 16 the contract is terminated at an early part, the 17 government doesn't have to pay lost profits. 18 Well, the problem here, Your Honor, and 19 I think the testimony has been said many times, 20 this contract was 90 or 95 percent complete at the 21 time of termination. The problem there is, the 22 government, by terminating for convenience at the 23 end of the job, accepts the risk that the amounts 24 paid are less than the amounts incurred by the 25 contractors. If the contractor is losing money on</p>
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<p>1 the state cannot say to this jury that the 2 contractors are not entitled to present their 3 claim for their actual cost of the work, the 4 executed work, less the amount previously paid by 5 the state. That is the measure of damages here. 6 THE COURT: Hobson had been paid somewhere 7 in the neighborhood of \$700,000 -- right? -- up 8 until the time that they were terminated? 9 MR. HENRY: Right. 10 THE COURT: Are they claiming that there was 11 a couple million dollars' worth of work that they 12 had done prior to June 3? 13 MR. HENRY: That's not been paid for? The 14 answer to your question is no. We're going to 15 come in with a job cost report and a calculation 16 of the reasonable overhead and profit that's 17 allowed, and we're going to put that on as our 18 claim. 19 THE COURT: And what's the claim going to 20 be? 21 MR. HENRY: Probably somewhere less than 22 \$600,000, because total cost is what we're 23 entitled to. That's how it is calculated, and 24 total costs are in fact where they should be. 25 And we think that Your Honor has</p>	<p>1 the job, he gets well in a termination for 2 convenience. That's a problem for the state here 3 because that's the way -- 4 THE COURT: Yeah, boy -- 5 MR. HENRY: But Your Honor, that's the plain 6 language of the agreement. That's what all that 7 authority that we cited to you says: Total cost 8 is the measure of recovery. If they had 9 terminated the contract after 5 percent of the job 10 was completed, they would have no problem. 11 But they waited and terminated for 12 convenience. That wasn't something we asked them 13 to do; that's something the state opted to do. 14 They didn't terminate for cause under the 15 contract. They didn't terminate for default under 16 the contract. They terminated for convenience, 17 wrote it in black-and-white, signed the letter on 18 June 3, and sent it to SE/Z. Done. 19 THE COURT: Fair enough. 20 MR. HENRY: And they have a contract, and 21 they can't wiggle out of the fact that this is the 22 recovery that's allowed. And so we would ask 23 Your Honor to limit the evidence that indicates 24 that that's not the way it can be calculated. 25 THE COURT: Very good. Thank you, counsel.</p>

27 (Pages 102 to 105)

1 Appreciate it.
 2 Mr. Hahn, briefly?
 3 MR. HAHN: I'm sorry, Your Honor?
 4 THE COURT: I just said briefly. I guess
 5 I'm expecting the bulk of the argument to come
 6 from Mr. Oberrecht.
 7 MR. HAHN: Thank you, Your Honor. I will
 8 follow the court's instructions.
 9 I think the court's colloquy was right
 10 on. I think the court sees this case the way the
 11 evidence should go to the jury. I think the
 12 motions in limine that I want to address are the
 13 two in the middle: contract all-in or all-out.
 14 And I think the big issue here is whether DPW can
 15 establish liability before it puts on its evidence
 16 of all these grave damages.
 17 Now, the court disagreed, and there's a
 18 ruling that says they don't have to strictly
 19 comply with the notice provisions of the contract
 20 so long as the state can put on evidence of actual
 21 knowledge by SE/Z --
 22 THE COURT: And no prejudice.
 23 MR. HAHN: -- and no prejudice. In fact,
 24 Mr. Oberrecht mentioned it today. He said, You're
 25 going to hold me to that. And I think the proper

1 motion in limine here today is, the court should
 2 hold DPW to that but before they get to the issues
 3 of these damages.
 4 Because if they can't prove liability
 5 under the contract, we don't need to sit through
 6 weeks and weeks of ductwork being brought into the
 7 courtroom or all the parade of horrors.
 8 It's like the double amputee: You want
 9 to roll into court. You can't establish liability
 10 but you want that double amputee sitting in front
 11 of the jury for weeks and weeks and weeks.
 12 Your Honor, that's a proper motion in
 13 limine. We should deal with the liability issue
 14 first and order the proof. The evidence should be
 15 evidence of liability and then the damages. And I
 16 think the issue of the paint is probably a good
 17 illustration of that.
 18 This claimed issue arose several years
 19 after the termination for convenience. There had
 20 been contractors in and out of that facility for
 21 years doing whatever they were doing. SE/Z, the
 22 only evidence in front of this court on that issue
 23 right now is from Mr. Zambarano's affidavits,
 24 which are in the record. He was never provided
 25 any notice, any opportunity to cure.

1 The work was done by a subcontractor,
 2 Your Honor. That subcontractor had insurance, but
 3 the way this thing came down, we couldn't look to
 4 the subcontractor. We couldn't get his insurer
 5 involved to come fix a claimed defect.
 6 Your Honor, we think -- we understand your ruling.
 7 We just want it applied, applied in how the
 8 evidence is brought into this case, how it is
 9 presented to the jury.
 10 And I think it's a simple thing for DPW
 11 to do. They can present the evidence of how they
 12 complied with Your Honor's exception to the plain
 13 language of the contract, and then present its
 14 claim for defective paint or whatever those
 15 offsets are.
 16 Your Honor, you touched on it when you
 17 went through your colloquy. Terminated for
 18 convenience, they got a bill, and then DPW
 19 decided, Well, what's the best defense? It's a
 20 really good offense. So we're going to go hire --
 21 Mr. Munio, we're hire WGI, and we're going to come
 22 up with some damages.
 23 Your Honor, we just want to establish
 24 liability before there's any evidence of this
 25 damage, and that can be done with respect to each

1 of DPW's claimed offsets or counterclaims.
 2 I'm going to take Your Honor's queue.
 3 Thank you.
 4 THE COURT: I appreciate it.
 5 Mr. Oberrecht?
 6 MR. OBERRECHT: Do I get more than 15
 7 minutes?
 8 THE COURT: The clock is ticking.
 9 MR. OBERRECHT: Since Mr. Henry had a half
 10 an hour.
 11 THE COURT: I won't cut you off mid
 12 sentence, and he didn't have quite a half hour.
 13 MR. OBERRECHT: Okay. Thank you. I just
 14 want my just desserts.
 15 THE COURT: Go ahead.
 16 MR. OBERRECHT: I'm going to hit the first
 17 three motions in limine very quickly, and I'm
 18 going to get to total costs.
 19 First off, the first motion I
 20 characterize as there should be no evidence that
 21 work which involved pre-termination change order,
 22 et cetera. This is all on the pre-termination
 23 change orders and whether or not they should be,
 24 as Mr. Henry put it, what is good for the goose is
 25 good for the gander.

1 And I would submit to you, Your Honor,
2 that we have a ruling from the court that says
3 that it's on a motion that was brought by the
4 defendants to say that under the language of the
5 contract and the language of the change orders,
6 there was a waiver of any additional costs to be
7 incurred that can be claimed by the plaintiffs.

8 And I think what they're wanting to say
9 now is a little bit different than what is good
10 for the goose is good for the gander. Because
11 what is good for the goose and good for the gander
12 with the change order is that, okay, we can't now
13 come back and say, We agreed to pay you \$64,000
14 for all that work that we identified, that you
15 costed out. We're not allowed to charge you
16 \$75,000 now.

17 That's what is good for the goose and
18 what's good for the gander. That's not what
19 they're asking for. What they're asking for is,
20 well, if there was any type of work that happened
21 to touch on anything that was referred to in a
22 change order and now the state is claiming that,
23 gosh, that was defective, you can't, as a matter
24 of the court's ruling, come in and try to prove
25 that we came up with defective whatever, defective

1 work. And I don't think that's a correct -- I
2 don't think that would be a correct ruling on the
3 part of the court here.

4 Now, if the court says you have a
5 change order and I'm not going to let you undo
6 your deal on that change order, wherever that
7 change order language expands to in the court's
8 understanding, we're going to be stuck with that.
9 But I don't think it necessarily means what I
10 think they're trying to argue.

11 THE COURT: Yeah. I understand that you're
12 concerned that they're going to go -- that they're
13 going to try to use the court's prior ruling on
14 the effect of these change orders as settling the
15 issue contained in the change order and try to
16 expand the scope of the change order.

17 And you're going to say, Look, we
18 signed a change order regarding this discreet
19 problem on this particular part of the project,
20 and that was settled. But to the extent that they
21 are claiming more money on -- to the extent that
22 they're claiming more money for that discreet
23 issue, the change order settles that.

24 You're concerned that they're going to
25 try to charge additional sums for issues settled

1 by the change orders, for one. Right?

2 MR. OBERRECHT: I'm concerned with two
3 things, and that's one. That's the impact claim.

4 THE COURT: Right. And the other thing is
5 that no matter what else happens, whether it was
6 pre-termination or post-termination, something
7 that was discovered that was, it just happened
8 there was something about stainless steel in
9 change order number 5, that that doesn't
10 necessarily preclude you from possibly presenting
11 your claims that you discovered pre-termination or
12 post-termination on that issue.

13 We're going to want to get into this
14 whole issue of pre-termination, post-termination,
15 too, in a minute, but that is number one. I
16 understand your change order argument.

17 MR. OBERRECHT: The next one is, since we
18 have terminated for convenience, to me that's just
19 a rehash of what the court previously ruled.
20 Since we terminated for convenience, we really
21 can't make any counterclaims. We can't have
22 affirmative claims because we terminated for
23 convenience, and that means they get whatever they
24 wanted even if they were losing on the contract,
25 and that's not the law.

1 And they're trying to preclude us now
2 from bringing our counterclaim, from bringing our
3 offsets, and from raising our defenses, and the
4 court has previously ruled on that. I'm not going
5 to argue that again.

6 THE COURT: Here is what I want to talk
7 about a little bit, Mr. Oberrecht: the
8 distinction between pre-termination, between
9 defective work that was discovered pre-termination
10 versus defective work that was discovered
11 post-termination.

12 MR. OBERRECHT: We talked about that, and
13 I'm going to tell you, Your Honor, what I told you
14 when you asked me about this when we argued this
15 motion before.

16 THE COURT: When was that?

17 MR. OBERRECHT: Long before the trial.

18 THE COURT: 2006.

19 MR. OBERRECHT: Something like that.
20 Because Stewart, Sokol and Gray were here arguing
21 heavy, heavy, heavy contract law from the federal
22 government because they have cost language in
23 their termination for convenience clause that I'm
24 going to show Your Honor. It's very different
25 from our termination for convenience clause in

1 this contract.

2 When we were arguing that, you asked
3 me, Are you saying that you can terminate for
4 convenience instead of default and still make a
5 claim against SE/Z, your contractor, for defective
6 work that you had discovered before you
7 terminated, before you elected to terminate for
8 convenience?

9 And I said, No, that's not what we're
10 going to do. What we're going to do is we're
11 going to demonstrate that after the termination
12 for convenience, which we thought the project was
13 95 percent complete, fine, we're going to go on,
14 we're going to finish up the last 5 percent and
15 we're going to be good. I said, What we're going
16 to be claiming and asking the jury for is for the
17 damages that we encountered trying to fix up the
18 mess that we discovered after we got in to find
19 out, Well, okay, what's the last 5 percent we have
20 to do? And we discovered all sorts of things we
21 didn't know about.

22 Now I know I've got to prove that, but
23 that's what my case is, Your Honor.

24 THE COURT: And, boy, that is.

25 MR. OBERRECHT: That's my case.

1 THE COURT: I understand.

2 MR. OBERRECHT: So I think you should not
3 reverse yourself on that and allow me to go
4 forward with my counterclaim, my offsets, and my
5 defenses. And, Your Honor, if you want me to get
6 back in and argue that same law and the same
7 contract provisions that I did back then, that you
8 relied on, I will, but I hope you're not inclined
9 to do that.

10 THE COURT: Well, I will be candid, and I
11 might take you up on that. I'm troubled by a
12 contract that is terminated for convenience, I can
13 understand an owner, whether it's the state or any
14 other owner, receiving a bill that is way in
15 excess of what you anticipated getting.

16 I'm also troubled by the idea that the
17 owner terminates for convenience and then later
18 finds out that a lot of the work that was done was
19 allegedly defective and that you only discovered
20 that after you terminated for convenience.

21 MR. OBERRECHT: You have to accept that for
22 purposes of this motion. You have to accept that
23 I'm going to be able to prove that. If I don't
24 prove that, I've got other trouble.

25 But, Your Honor, the argument that has

1 been made to you is an argument that is based on
2 federal law, and federal law is based specifically
3 on a contract clause that is vastly different in
4 every respect from the contract clause you're
5 dealing with here. May I approach the bench?

6 THE COURT: Sure.

7 MR. OBERRECHT: For our prior trial, if
8 you'll turn to the first page of this document,
9 I've done some highlights and underscoring and
10 stuff like that. This is a termination for
11 convenience of the government on a fixed price
12 contract dated 2004 that I just downloaded out of
13 the federal acquisition regulations.

14 THE COURT: So this is a sample of a federal
15 contract, and your contention is that New York
16 Shipbuilding case, or whatever --

17 MR. OBERRECHT: It was done under a similar
18 clause.

19 THE COURT: That contained similar language
20 to this --

21 MR. OBERRECHT: Exactly.

22 THE COURT: -- and the contract that we're
23 dealing with is decidedly different.

24 MR. OBERRECHT: It's decidedly different.
25 And Messers Henry and Hahn know federal

1 contracting law, and it's a particular area that
2 some of us lawyers get involved in. But there is
3 a whole body of law that has developed over
4 terminations for default and terminations for
5 convenience under the federal acquisition
6 regulations, et cetera.

7 And the federal acquisition
8 regulations, for instance -- and you have the
9 Armed Services regulations and every one of the
10 entities has regulations, and they have these
11 clauses. And the contracting officer who puts the
12 contract together can insert these clauses. This
13 is just a typical clause.

14 What I want the court to look at under
15 that, on that second page, is look where they talk
16 about costs. For example, under 2, this says, in
17 essence, you can recover under a termination for
18 convenience, the contractor can recover. Go down
19 to number 2: The total of, number 1, the costs
20 incurred in the performance of the work, including
21 initial costs, et cetera, et cetera, et cetera.

22 Then it goes down under Item 2.2: The
23 cost of settling and paying termination settlement
24 proposals. Termination settlement proposals are
25 particular items in the federal system.

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<p>1 Then Item number 3: A sum as profit 2 on -- blah blah blah blah. 3 And then you go down to Item number 3: 4 The reasonable costs of settlement of the work 5 terminated. Under 3.3: Storage transportation, 6 other costs incurred. 7 You will not find the word "costs" in 8 our termination for convenience clause. It's very 9 different from this. 10 Also Mr. Henry said: In a termination 11 for convenience -- like everybody understands 12 this. In a termination for convenience, the 13 contractor is to be made whole even if he is 14 incurring a loss on the project. That's not even 15 true under the federal law, Your Honor. 16 And in fact, I've pointed out here, 17 I've underscored it under Item 2, it's G.23.3, if 18 you'll look at that. It's where they're talking 19 about profit, and I underscored some stuff there 20 for you: If it appears that the contractor would 21 have sustained a loss on the entire contract, had 22 it been completed, the contracting officer shall 23 allow no profit under the subdivision G.23.3, and 24 shall reduce the settlement to reflect the 25 indicated rate of loss. That's a big deal in</p>	<p>1 THE COURT: What was the date of your brief 2 in that, just the date you signed it? 3 MR. OBERRECHT: I don't know, because all I 4 have is parts and pieces. 5 (Directed to Mr. Comstock): Chris, do 6 you remember? 7 MR. COMSTOCK: I don't, but I can e-mail 8 that to the parties. 9 THE COURT: I think we can get our hands on 10 it. 11 MR. OBERRECHT: I have the applicable pages 12 here of just that. 13 THE COURT: I can find it. I just thought, 14 if you just happen to have the date, I can find it 15 in 2 minutes as opposed to taking 5 minutes. 16 MR. OBERRECHT: We also cited you to other 17 cases before the Armed Services board of contract 18 appeals and other boards of contract appeals that 19 said, Wait a minute, that shipbuilding case, that 20 New York shipbuilding case, is not one that we're 21 likely to follow, and for the following reasons, 22 and they said that. 23 And so that got us out of the federal 24 law and dealing with the law that we're dealing 25 with here.</p>
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<p>1 federal contracting law. 2 Then if you'll look down at the bottom 3 where I put the arrow, this even shows that the 4 government contract clause itself says any claim 5 which the government has against the contractor 6 under this contract, that's going to be deducted. 7 Even in the federal situation, a claim is going to 8 be deducted, Your Honor. 9 I know that's not applicable, but 10 Mr. Henry has argued to you that this is 11 Black Letter law, it's hornbook law. It is not. 12 And the law in Idaho has not been settled on 13 termination for convenience clauses. So what you 14 are faced with, Your Honor, is the general law of 15 interpreting contracts in this very specific 16 contract that we're dealing with here. 17 I urge you, Your Honor, not to overturn 18 your previous ruling. If you would go back and 19 look at the briefing that we did, we showed that 20 even the New York shipbuilding case, which is a 21 1972 case, has been abrogated by a different board 22 of contract appeals. 23 THE COURT: I think I pointed that out in my 24 opinion, didn't I? 25 MR. OBERRECHT: You did.</p>	<p>1 And I urge you, Your Honor, don't 2 overturn that law of the case that you have 3 established that we've worked under. 4 THE COURT: Okay. Now, that's not a ruling 5 when I say "okay." 6 MR. OBERRECHT: And I urge the court to look 7 back at clauses of the contract that allow us to 8 do what we're doing, and that would be when I 9 mentioned it at the beginning of my other 10 argument, 13.4.1 -- 11 THE COURT: Well, I've already ruled 12 specifically on that too. 13 MR. OBERRECHT: You have, and 13.4.2 where 14 you said we could bring our claims, offsets, and 15 have our defenses. 16 The third motion is: No evidence of 17 damages can be presented, in essence -- I'm 18 paraphrasing this -- because the state failed to 19 provide contractual notice. I'm not even going to 20 get into that. I can't imagine that the court 21 would reverse its ruling on that. 22 But I am going to get into, okay, what 23 about this total cost approach. I have something 24 to show Your Honor in my handy-dandy flip chart 25 here. May I approach the easel?</p>

31 (Pages 118 to 121)

1 THE COURT: Sure.

2 MR. OBERRECHT: Anticipating this
3 argument --

4 THE COURT: Maybe if you take that other one
5 out.

6 MR. OBERRECHT: Okay.

7 (Discussion off the record.)

8 MR. OBERRECHT: We're talking about the
9 measure of damages here, and we start off with the
10 termination for convenience. What we've got is,
11 let's consider the measure of damages without even
12 considering the state's defenses, offsets, or
13 counterclaims. What would the measure of damages
14 be? What are they going to have to do under the
15 contract?

16 Well, the contract says: In a
17 termination for convenience, under 14.1.3, as
18 modified by the supplemental conditions, which
19 took one word out, which was damages, you get two
20 things. You get to recover payment for work
21 executed.

22 That's what I think Your Honor was
23 talking about before, and we believe that's
24 payment under the contract. After all, the
25 contract was all about big W work in return for a

1 fixed payment, and that fixed payment is
2 identified in the payment provisions of the
3 contract. Where you talk about big W work,
4 remember the schedule of values where they had to
5 break out all their work into a schedule? They
6 would have to attach that to their pay
7 applications every month so they got progress
8 payments on their fixed price contract. And they
9 had to give a representation of what percentage of
10 each item of this work had been completed by that
11 date.

12 You add that up, subtract 5 percent for
13 the retainage, which would be held back by the
14 owner, and that's what they got paid when the
15 owner says, Okay, this is all certified now, we
16 see what you have done under your schedule of
17 values where you broke out all your work. We're
18 going to pay you 95 percent of this. Hold back
19 5 percent.

20 That's payment under the contract for
21 big W work. They get that for any work that
22 they've done that we haven't paid them for, they
23 get that.

24 They get another thing, and it's very
25 specific. It is they get to recover for proven

1 loss, is the wording of the contract, proven loss
2 regarding materials, equipment, tools, and
3 construction equipment and machinery, including
4 reasonable overhead and profit.

5 Nowhere in that clause that I've
6 paraphrased here but in the actual wording does it
7 make reference to the word "costs," and that's a
8 big deal here. It's a big deal, because what
9 they're wanting you to say is that they're allowed
10 to recover all their costs incurred whether they
11 were inefficient, whether they were unreasonable,
12 whether their bid was too low, and whether they
13 caused it with self-inflicted injuries. They're
14 saying, Give that all to us.

15 THE COURT: Well, I think they are.

16 MR. OBERRECHT: That's what they're saying,
17 yeah. No question about that.

18 THE COURT: They're saying that the contract
19 allows them to do that.

20 MR. OBERRECHT: And I'm saying that that's
21 not what it allows at all. What I'm saying is,
22 This is what it allows, precisely, and it doesn't
23 say you get your costs. You get contract
24 payments, and you get proven loss on these
25 particular items.

1 I'm going to calculate that out for you
2 with the evidence that we saw at trial. So the
3 first one, payment for work executed, here is the
4 amount that Your Honor was referring to.

5 MR. HENRY: Your Honor, I'm going to object.
6 You can't argue what the recovery is going to be.
7 This isn't a bench trial we're having this
8 afternoon. The fact of the matter is, we're
9 talking about contract interpretation here. Math
10 doesn't enter into it right now, and we would ask
11 Your Honor to stop listening to this.

12 THE COURT: I am going to allow
13 Mr. Oberrecht to make his argument in opposition
14 to the motion in limine regarding the measure of
15 damages that ought to be allowed, and it's okay if
16 he uses a little math.

17 MR. HENRY: It's irrelevant.

18 THE COURT: Never the less, I'm going to
19 hear it.

20 MR. OBERRECHT: So here is the contract
21 amount with all of the change orders added in.
22 It's \$735,155. Here is the amount that was about
23 \$700,000 that was paid. They're going to present
24 this evidence, and it will be the same.

25 The balance is \$50,643.11. That

1 includes that retainage and there's, I don't know,
2 like \$3,000 worth of work we never paid them for.

3 THE COURT: Yeah, I remember that.

4 And, Mr. Henry, just for your
5 edification, I'm not writing these numbers down.

6 MR. HENRY: Thank you.

7 THE COURT: I really am not. But I think
8 that it's fair enough, I think I should give them
9 plenty of latitude in your argument.

10 So you can continue.

11 MR. OBERRECHT: And so then if you look at
12 loss regarding materials, equipment, machinery,
13 tools, et cetera. There was an exhibit during the
14 trial, and they finished their case in chief.

15 Maybe they're going to come up with something
16 different this time, but on the basis of the last
17 trial, they had an exhibit called "plant costs."

18 And the only thing that was on that
19 exhibit for plant costs was we had -- I can't
20 remember what all it was, but it was a field
21 trailer. That was part of their plant costs. And
22 their plant costs were calculated at \$19.58 a day,
23 and I calculated the number of days for the whole
24 time they were on the project from the time they
25 left or from the time of the termination letter,

1 from June the 3rd until June the 30th. Then they
2 stopped working under their great big job cost
3 detail report that they gave us. It was the last
4 of their work they did on it.

5 And so if you calculate that \$19.58 per
6 day, it comes up to \$528.66. They get a grand
7 total of \$51,171.77 under the contract. That's
8 what we're going to argue, and that's what we're
9 going to argue to the jury. We think that's what
10 the contract means.

11 Now they're saying, That's crazy. That
12 doesn't get to everything else that we're asking
13 for here like all those delay damages that were
14 caused, allegedly caused, by the architect that we
15 can't prove now.

16 Well, I've got to have the right to
17 make them prove it, though. And they're saying,
18 Okay, how do we get our damages for a claim that's
19 different from termination for convenience?

20 Now, they want to argue, Hey, don't be
21 thinking about this. Our damages all come under
22 this termination for convenience, so we don't have
23 to deal with the claim provisions of the contract
24 or actually having to prove a claim.

25 I submit to you, Your Honor, that

1 that's incorrect legally and it's incorrect under
2 our contract.

3 So if they have a claim, though, do
4 they have a claim outside of the termination for
5 convenience? Maybe they do. But if they do, here
6 is what I think they have to do.

7 They have to prove two things like
8 every contractor ever has to prove for a claim,
9 which is extra contractual. They have to prove
10 entitlement -- you're entitled to it, to be paid
11 by somebody else -- and you have to prove the
12 amount. Construction lawyers frequently talk
13 about entitlement and quantum. That's why I put
14 the "quantum" down there.

15 Okay, what do they have to prove for
16 entitlement, it's like a negligence claim or
17 something like that. Well, it's not a negligence
18 claim here. It's just that they have to prove to
19 the jury that they're entitled to an extra, an
20 extra that is outside the scope of the contract.
21 They had to do additional work or they incurred
22 additional expense for which they should get paid.
23 And so they have to prove that there was extra
24 work that was required by something the owner did
25 or there were delays that were caused by the

1 owner.

2 And the cause part of this is critical.
3 Otherwise, they could just be sloppy and
4 inefficient and say, Hey, we get it. We get
5 everything we ask for.

6 That's not the way it works.

7 THE COURT: Well, if they're going to be
8 sloppy and inefficient, they run the risk of being
9 terminated for cause. Right?

10 MR. OBERRECHT: Well, they could.

11 THE COURT: And the same thing occurred to
12 me that a sneaky contractor could do horrible
13 work, get paid for it, because the owner isn't
14 paying very close attention and then be terminated
15 for convenience and then give them the bill for a
16 million dollars.

17 MR. OBERRECHT: That's not the owner's
18 fault. I mean, the owner doesn't get hit with
19 extra costs because the owner doesn't catch them
20 doing something bad. If they don't comply with
21 the contract, they don't comply with the contract.

22 THE COURT: I understand.

23 MR. OBERRECHT: Okay. Let me finish this
24 up, then.

25 They also, then, have to prove up the

1 amount. And how do they prove the amount that
2 they're entitled to? Once they get past this
3 entitlement phase, well, they do it discreetly.
4 That's the preferred method.

5 THE COURT: Line-by-line.

6 MR. OBERRECHT: It doesn't have to be
7 line-by-line, but you have to tie it together.
8 This is what happened, and this is what it cost
9 us, fine.

10 They can't do that, and they've said
11 they haven't kept those kind of records or
12 anything. They just can't do it.

13 And so the other method that has been
14 used before is what they've wanted to use, and
15 it's a total cost method. And the total cost
16 method, though it's disproved -- not disproved
17 but --

18 THE COURT: Disfavored?

19 MR. OBERRECHT: Thank you. It's disfavored.
20 The courts say, Okay, here is what a total cost
21 claim is. You take all of your costs that you
22 incurred in the whole profit, and you subtract out
23 your bid. This is a fixed-price contract. And so
24 if you bid \$600,000 for it and it took you a
25 million, you get \$400,000. Well, why should you

1 get that \$400,000? And the courts have said, who
2 have allowed that type approach, Okay, we're going
3 to give it to you, but you have to come up with
4 this proof. You have to prove, number one, that
5 you can't discreetly price your claim. It's
6 impossible to do that.

7 So okay, it's impossible. All right.
8 You also have to prove that your bid was
9 reasonable, because if your bid was ridiculously
10 low, you shouldn't get the difference between your
11 bid and your actual costs.

12 And the third thing you have to prove
13 is that the costs that you incurred were
14 reasonable for the work that you were doing
15 because if they --

16 THE COURT: Well, and that you also have to
17 prove that the delays were not caused by you.

18 MR. OBERRECHT: That's number 4. That's
19 Item number 4, and that's the one that I'm going
20 to focus on. Because maybe they can come in and
21 prove all three of those, but I don't think they
22 can prove that all of these costs of theirs were
23 caused by the owner.

24 Okay. Let's assume they get past all
25 of that, they prove every bit of that, and they're

1 entitled to their claim. You know, they've met
2 the provisions of the contract that talk about
3 notice of claim and all that stuff just like what
4 we're going to be held to, and they give us their
5 actual notice and show that we haven't been
6 prejudiced and all that stuff. They're entitled.
7 Do they get their total costs?

8 The answer is no, there has to be
9 adjustments to total costs, and they're logical
10 adjustments. And these are the adjustments:
11 There have to be adjustments to eliminate all of
12 the costs of the change order work and their
13 impacts.

14 They can't just say, Here are all our
15 costs. Because they haven't done anything with
16 the change order work, which you have already
17 ruled, unless you reverse yourself now that
18 they're not entitled to get all that. That's part
19 of their burden of proof.

20 And finally, Your Honor, there are
21 contract clauses which they agreed to that say
22 they're not allowed to get any consequential
23 damages. Remember no home office personnel and no
24 loss of financing, and they can't get profit
25 except arising directly from the work.

1 And then finally, they get no delay
2 costs under the contract if there have been
3 concurrent delays, not just caused by the owner
4 but by them too. They just get a time extension.

5 4.3.5.1. If they prove that the delays
6 are just caused by the government, then here is
7 what they get to recover. They get the
8 superintendent's labor, fringes, and vehicle.
9 That's it. Plus, the field trailer, and that's
10 it, for delays. Nothing else.

11 So that has to be -- everything else
12 besides that has to be subtracted out of their
13 total cost.

14 That's it.

15 THE COURT: Fair enough. Folks, it's
16 6 o'clock.

17 Mr. Henry, go ahead.

18 MR. HENRY: There's really only two clauses
19 in the contract that are salient to this
20 discussion about total cost. 14.1.3, which sets
21 out the measure of the damages, and 1.1.3, which
22 defines work with a big W.

23 I think Your Honor ought to have a look
24 at both of those, because what is at issue here is
25 not what the federal acquisition regulations allow

1 contracting officers to do. And I frankly dispute
2 the fact that we've asked the court to decide this
3 on federal law.

4 We've asked the court to decide it on
5 the plain language of the contract: 14.1.3 and
6 the definition of work under 1.1.3. That's what
7 the state bargained to pay in the time of a
8 termination for convenience.

9 We've provided illustrative authority
10 to Your Honor in regard to how courts have dealt
11 with issues of total costs, quantum meruit, how
12 they've said -- what it is made up of. Clearly,
13 regardless, we believe that the court ought to
14 allow these claims to be made on total cost, that
15 that's what the measure of damages for termination
16 for convenience is.

17 And clearly, the state is going to have
18 the opportunity to say that those costs are
19 unreasonable. That's their defense here. The
20 defense isn't all of this, and their defense
21 isn't, anywhere in this contract does it say we
22 have to prove the elements of total cost. The
23 contract just allows it. It's the bargain the
24 parties made. They don't get to now come back and
25 parse it all back out and say, Well, here we go.

1 One of the things that Your Honor ought
2 to know about this little payment for work
3 executed, these two words don't appear in 14.1.3.
4 "Under contract" doesn't appear.

5 Mr. Oberrecht said he believed that's
6 how it should be interpreted. Well, plain
7 language is how it is to be interpreted. We don't
8 add for plain language. We don't infer. Plain
9 language is plain language. "Under contract"
10 doesn't appear. "Work executed" appears, and
11 "work" is a defined term.

12 When Your Honor reads those in harmony,
13 which of course the State of Idaho requires us to
14 do in regard to interpreting contracts so that we
15 give full meaning and effect to all provisions of
16 the contract, you're going to come to the same
17 conclusion, we believe, which is that work
18 executed, all labor, materials, equipment at 1.13
19 says is the measure of the damages.

20 The state is going to have its
21 opportunity at the trial to dispute that the
22 costs, that all labor, materials, and equipment is
23 unreasonable. It's going to have an opportunity
24 to say that the calculation of the allowed
25 overhead that's allowed by 14.1.3 and profit are

1 unreasonable.

2 That's the defenses that they've got,
3 Your Honor. And we think in regard to this total
4 cost, if you look closely at those two clauses,
5 you'll come to the same conclusion that we're
6 asking you to, and that you will limit the
7 evidence that's going -- that the state can
8 assert, that our measure of damages has to be
9 calculated in some other way.

10 Thanks. We're done.

11 THE COURT: Thank you very much, Mr. Henry.

12 Folks, thanks very much for your
13 patience this afternoon. I thought that we might
14 take a little bit more than the two hours that we
15 had originally allotted for this thing today, and
16 we did. But I frankly told the staff last night
17 we would probably be here until 6:00. So it's
18 5 after, and we almost hit it on the head.

19 I will draft up a written order that I
20 hope will address everything. And some of you
21 aren't going to agree with them, I understand, but
22 at least I hope to draft it up in a manner that
23 all of you understand it.

24 And then I think our next -- the next
25 time we'll meet will be the 30th, that's for the

1 pretrial?

2 MR. OBERRECHT: I submit that we'll meet
3 earlier than that, because I'm going to file a
4 motion to vacate the trial under the circumstances
5 of Rudeen being dismissed out of the case. I am
6 now placed in an impossible situation with now
7 architects who will be hostile to me whose
8 evidence I must obtain. And I'm going to seek
9 additional discovery, too, because one of those --
10 at least one of those persons is out of state, and
11 this changes the complexion of things dramatically
12 for me.

13 And so I will file a motion to vacate
14 the trial, and I'll ask that that be heard early.
15 Maybe we could do it by phone. I sure don't
16 object to that, but since we're all two weeks away
17 from trial, I'll get that filed tomorrow, and I'll
18 ask for a shortened hearing time on that.

19 THE COURT: All right. Thanks for giving me
20 a heads up.

21 Without further order of the court, the
22 next time we will meet will be the 30th at 3:00,
23 and then we're scheduled to meet again April 1.
24 Let's just assume for the sake of this discussion
25 that the trial is going to go on as planned, and

1 we have a lot of jurors coming in because we
2 anticipated that this trial would take an awfully
3 long time.

4 It was our experience at the last
5 trial, that counsel for Rudeen, and I certainly
6 mean him no disrespect, but consumed a large
7 percentage of the total trial time when it came to
8 questioning of the witnesses and cross
9 examination, and so forth, and we won't have that.

10 Now, of course, I haven't had you in
11 front of me, Mr. Henry, and I don't know how quick
12 you are.

13 MR. HENRY: Could be verbose, Your Honor.

14 THE COURT: Well, don't be too verbose.
15 We'll take as long as we need to try the case.
16 But these are real sensitive issues when it comes
17 to asking a jury to set aside a couple of months
18 of their lives for \$10 a day. We'll run into an
19 awful lot of opposition potential jurors who will
20 truly suffer a hardship and therefore will be
21 excused if we ask them to give up two months of
22 their life.

23 However, I think that if we're careful
24 and if we keep our eye on the clock, that we can
25 finish this trial in much less time than eight

1 weeks.

2 I'm looking for some indication.

3 MR. OBERRECHT: I'm not going to agree to
4 shorten time, Your Honor. You're going to have to
5 order it. I just won't agree.

6 THE COURT: Listen, Mr. Oberrecht, I'm not
7 going to tell you today that the trial must be
8 finished earlier. But remember the first time we
9 came in here, we had four parties instead of
10 three.

11 MR. OBERRECHT: I remember that.

12 THE COURT: And all of the parties agreed,
13 even up to the day that we went in and swore that
14 jury panel to fill out their questionnaire, that
15 the trial could be done in three weeks.

16 MR. OBERRECHT: That is not true.

17 THE COURT: It is true.

18 MR. OBERRECHT: You gave us four weeks. See
19 if we'll try to give it in three.

20 THE COURT: Fair enough. But I certainly
21 didn't have any indication that it was going to
22 take seven weeks or eight weeks at the beginning
23 of the trial.

24 MR. OBERRECHT: But I have almost twice the
25 work to do now too. I know, it's not your

1 problem, Your Honor.

2 THE COURT: It is so much my problem,
3 Mr. Oberrecht. It is really my problem. It
4 really is. I have the duty to make sure that the
5 trial is handled in an efficient manner. And
6 setting a trial for eight or nine weeks is a
7 massive undertaking that involves me, for example,
8 vacating 22 other jury trials that I have
9 scheduled. Granted, not all of those would go.
10 Probably two or three of them would go, but I have
11 to get rid of those or bring a retired judge in at
12 some expense to take care of those things.

13 So I will not necessarily just swallow
14 whole the suggestion that because of my ruling
15 with respect to getting rid of Rudeen today that I
16 am going to, once again, either have to vacate the
17 trial or extend the length of the trial beyond
18 even eight weeks --

19 MR. OBERRECHT: Well, I can't imagine
20 myself. I will do everything in my power to try
21 this case as efficiently as possible. No question
22 about that. I do have a lot more work to do, and
23 I think Your Honor recognizes that.

24 THE COURT: I do. As I recall, you were
25 pretty quick the first time around.

1 And again, Mr. Stefanic, don't go home
2 and tell Mr. Anderson that I was critical of the
3 fact that he was a thorough and conscientious
4 attorney, because that's all I mean.

5 What else? Anything?

6 MR. HENRY: One thing that we haven't
7 addressed, Your Honor, I'm assuming we're going to
8 hear from you about the things we just argued, but
9 you dismissed Rudeen but you haven't indicated
10 what effect that has on their motion in limine.

11 THE COURT: Be more specific.

12 MR. HENRY: Well, my argument to Your Honor
13 was, if Rudeen is out -- excuse me for not
14 standing. But if Rudeen is out, no standing for
15 their motion in limine ought to be denied. But
16 Your Honor --

17 THE COURT: You mean, Rudeen's motion in
18 limine?

19 MR. HENRY: Correct.

20 THE COURT: Yeah, it is denied.

21 MR. HENRY: All we need. Thank you.

22 THE COURT: Sorry I didn't make that clear
23 earlier.

24 I realize that this, Mr. Oberrecht,
25 changes your approach to the case, and it may --

1 well, it's going to do what it does with your
2 case. I don't see it as necessarily weakening
3 your position or causing you additional work, but
4 we'll see.

5 MR. OBERRECHT: Okay.

6 THE COURT: Is there anything else to come
7 before the court at this time?

8 MR. OBERRECHT: No. Thank you.

9 THE COURT: Sometime before 5 o'clock
10 tomorrow I'll fax out my written order on these
11 last four issues.

12 Very good. Thanks folks. I appreciate
13 it.

14 (6:11 p.m. The proceedings adjourned.)
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1 REPORTER'S CERTIFICATE
2
3
4

5 I, Dianne E. Cromwell, Official Court
6 Reporter, County of Ada, State of Idaho, hereby
7 certify:

8 That I am the reporter who took the
9 proceedings had in the above-entitled action in
10 machine shorthand and thereafter the same was
11 reduced into typewriting under my direct
12 supervision; and

13 That the foregoing transcript contains a
14 full, true, and accurate record of the proceedings
15 had in the above and foregoing cause, which was
16 heard at Boise, Idaho.

17 IN WITNESS WHEREOF, I have hereunto set
18 my hand April 8, 2010.
19
20
21
22

23 Dianne E. Cromwell, Official Court Reporter
24 CSR No. 21
25

ORIGINAL

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Attorneys for Defendants State of Idaho

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HOBSON FABRICATING CORP., an Idaho corporation,)	
)	Case No. CV OC 0508037
)	
Plaintiff,)	
)	
v.)	THE STATE OF IDAHO'S
)	MEMORANDUM IN SUPPORT OF
SE/Z CONSTRUCTION, LLC, an Idaho limited liability company; and STATE OF IDAHO, acting by and through its Department of Administration, Division of Public Works,)	MOTION TO DISALLOW SE/Z AND HOBSON'S JOINT MOTION FOR AWARD OF COSTS AND FEES
)	
Defendants.)	
)	
STATE OF IDAHO, acting by and through its Department of Administration, Division of Public Works,)	
)	
Counter-Claimant,)	
)	
v.)	
)	
HOBSON FABRICATING CORP., an Idaho corporation,)	
)	
Counter-Defendant.)	

SE/Z CONSTRUCTION, LLC, an Idaho limited)
liability company,)
)
Cross-Claimant,)
v.)
)
STATE OF IDAHO, acting by and through its)
Department of Administration, Division of)
Public Works,)
)
Cross-Defendant.)
)
STATE OF IDAHO, acting by and through its)
Department of Administration, Division of)
Public Works,)
)
Counter-Cross-Claimant,)
v.)
)
SE/Z CONSTRUCTION, LLC, an Idaho limited)
liability company,)
)
Counter-Cross-Defendant.)
)
STATE OF IDAHO, acting by and through its)
Department of Administration, Division of)
Public Works)
)
Third-Party Plaintiff,)
v.)
)
RUDEEN & ASSOCIATES, A)
PROFESSIONAL COMPANY, an Idaho)
limited liability company,)
)
Third-Party Defendant.)
)

The State of Idaho, acting by and through its Department of Administration, Division of Public Works (“the State”), pursuant to Rules 54(d)(6) and 54(e)(6) of the Idaho Rules of Civil Procedure, and hereby submits this Memorandum in Support of its Motion to Disallow Costs and Fees requested by SE/Z Construction, LLC (“SE/Z”) and Hobson Fabricating Corp. (“Hobson”).

I. INTRODUCTION

As explained in depth below, SE/Z and Hobson are not entitled to an award of costs or fees against the State, because neither one prevailed against the State in this litigation. Hobson did not prevail on any of its claims against the State. Rather, to the extent Hobson obtained any affirmative relief in this matter, it was against SE/Z and SE/Z only, as all of Hobson's claims against the State were dismissed. The State and SE/Z entered into a Settlement Agreement with regard to this matter, whereby the State, without admitting liability, paid SE/Z \$225,000 to resolve the instant matter. The amount paid by the State represents 11% of the amount claimed by SE/Z in this litigation, and does not make SE/Z a prevailing party. However, in the event the Court were to determine SE/Z was a prevailing party, it should be limited to recovery of only its costs as a matter of right, as SE/Z cannot establish the elements required to obtain discretionary costs or its attorney fees. Specifically, although this case involved some unique factual circumstances, it was not out of line with other breach of contract/construction defect cases involving State projects, that routinely involve large numbers of witnesses, vast numbers of documents and require extensive discovery and workup. Lastly, and very importantly, no party is entitled to attorney fees against the State because the State brought, pursued and defended this case with a reasonable basis in fact and law.

As such, the State respectfully requests the Court deny SE/Z and Hobson's claims for costs and fees in their entirety and find that no party prevailed in this action.

II. BACKGROUND

On or about July 1, 2003, the State awarded a contract ("the Principal Contract" or "the Contract") to SE/Z for "DPW Project #02-353, Health and Welfare Remodel State Lab for BSL-3" ("the Project"). (Complaint ¶ 6.) The Project involved the construction of a Level 3 Bio-

Safety Lab ("BSL-3") in Boise, Idaho. The BSL-3, once constructed, was intended to serve as a facility capable of handling extremely dangerous substances, such as anthrax or avian flu virus, enabling the State to analyze and contain such substances. *See* Affidavit of Elaine Hill in Support of Defendant State of Idaho's Opposition to Hobson Fabricating Corp.'s and SE/Z Construction, LLC's Motions for Partial Summary Judgment ("Hill Aff.") ¶ 2) filed on May 23, 2006; Affidavit of Albert F. Munio in Support of Defendant State of Idaho's Opposition to Hobson Fabricating Corp.'s and SE/Z Construction, LLC's Motions for Partial Summary Judgment ("Munio Aff."), ¶ 10 filed on May 23, 2006; Affidavit of Joe Rutledge in Support of Defendant State of Idaho's Opposition to Hobson Fabricating Corp.'s and SE/Z Construction, LLC's Motions for Partial Summary Judgment ("Rutledge Aff."), ¶ 8 filed on May 23, 2006. Because of the unique purpose of the BSL-3, it was absolutely critical that the facility be constructed correctly, as specified by the construction documents, to ensure that the substances handled in the BSL-3 would not endanger employees of the laboratory or the surrounding citizenry. *See* Munio Aff. ¶10.

On or about August 25, 2003, SE/Z signed a Subcontract Agreement ("the Subcontract") with Hobson, whereby Hobson agreed to perform mechanical work on the Project as a subcontractor under SE/Z. *Id.* ¶ 8. The mechanical work on the Project was the most critical component for the safe operation of the facility, as it involved the exhaust systems, which were intended to filter and capture the dangerous substances handled in the BSL-3 and to prevent them from being released into the laboratory or the atmosphere. Hill Aff. ¶ 9; Munio Aff. ¶ 10. Work on the Project commenced in approximately September 2003, with an anticipated completion date of May 26, 2004. Hill Aff. ¶ 3; Affidavit of Jan Frew in Support of Defendant State of

Idaho's Opposition to Hobson Fabricating Corp.'s and SE/Z Construction, LLC's Motions for Partial Summary Judgment ("Frew Aff."), ¶ 2.

Various issues with SE/Z's and Hobson's workmanship arose during the Project. For example, in approximately January 2004, the State and the engineer on the Project, Traci Hanegan, discovered that Hobson had installed an inferior grade of stainless steel with respect to the ductwork. Hill Aff. ¶ 5; Frew Aff. ¶ 3; Rutledge Aff. ¶ 3. In addition, in the Spring and Summer of 2004, the State brought in a third-party welding inspector, Mark Bell, to inspect Hobson's welds on the ductwork. Hill Aff. ¶ 6 and Ex. A; Frew Aff. ¶ 4; Rutledge Aff. ¶ 4. Mr. Bell discovered on both occasions that Hobson had performed reckless welding. *Id.* By this point in time, the Project was considerably delayed, due, in large part, to Hobson's actions. Hill ¶¶ 5, 7; Frew Aff. ¶¶ 3, 5-6; Rutledge Aff. ¶¶ 5-6. In the Spring of 2005, the State discovered that Hobson had negligently failed to install dampers clearly specified in the construction documents. Hill Aff. ¶ 7; Frew Aff. ¶ 5; Rutledge Aff. ¶ 5. These dampers were critical to the successful filtration and capture of substances handled in the BSL-3, and were necessary to prevent the release of such substances into the outside air. Hill Aff. ¶ 7. This incident resulted in further delay of the Project, which, by this time, appeared to be making no progress towards completion. Hill Aff. ¶ 7; Frew Aff. ¶¶ 5-6; Rutledge Aff. ¶¶ 5-6. SE/Z, as the general contractor, failed to keep the Project on schedule. Hill Aff. ¶ 7.

In June 2005, DPW, which believed that the Project was 90% complete and would require only a relatively small sum of money to reach completion, decided to terminate its Contract with SE/Z for convenience.¹ Hill Aff. ¶ 8; Frew Aff. ¶ 6; Rutledge Aff. ¶ 6. Following its termination for convenience, DPW retained Washington Group International ("Washington

¹ A termination for convenience is a one-sided termination, whereby the State may terminate the Contract regardless of the other party's performance under the Contract. This one-sided clause is agreed to by the parties to the Contract. (See Zambarano Aff., Ex. C, Art. 14.4, as modified by Ex. D, Art. 14.4.)

Group”) to inspect the work completed on the Project in order to determine what work was still needed to reach completion of the Project. Hill Aff. ¶ 9; Munio Aff. ¶ 2; Frew Aff. ¶7; (Rutledge Aff. ¶ 7. Washington Group ultimately discovered that the mechanical work completed by Hobson was unacceptable by normal industry standards, was grossly defective, and deviated grossly from the Contract specifications. Munio Aff. ¶¶ 4-11, 12-13 and Ex. B; Frew Aff. ¶ 7; Rutledge Aff. ¶ 7; Hill Aff. ¶ 9. Washington Group’s inspection revealed serious concealed defects with Hobson’s work, including unacceptable weld conditions (such as a failure to “purge” the welds with argon gas) and seriously damaged materials due to installation error. *Id.* As constructed, the bio-safety lab could not operate safely. Munio Aff. ¶ 10. The original Contract with SE/Z provided a budget of \$1,314,883 to complete the entire Project. Frew Aff. ¶ 1. Hobson was to receive a total of \$657,500 for its work on the Project. *See* Complaint, Ex. A (Subcontract), Art. I. Despite the fact that Hobson had allegedly completed approximately 90% of its work on the Project, in order to bring the Project to completion, the State was forced to replace much of Hobson’s mechanical work at a cost then estimated at well over one million dollars. Munio Aff. ¶¶ 3, 12; Munio Aff., Ex. B, p. 11711; Hill Aff. ¶ 9. In other words, the State was in a situation where it believed it had to expend more than the original Contract price for Hobson’s work—and nearly the full original Contract price for the entire Project—to bring the BSL-3 to completion in accordance with the Contract specifications and in a manner that ensures the safety of the surrounding citizenry.

On October 26, 2005, Hobson filed a Complaint against SE/Z and the State for damages related to the Project. Attached to its Complaint was its Notice of Tort Claim against the State which identified its damages as \$1,556,930.44. SE/Z then filed a cross-claim against the State, in which it asserted claims on behalf of itself and its subcontractors related to the Project. SE/Z

provided the State with an original claim amount on the Project of \$1,973,107.38, which included claims from its subcontractors, including Hobson. *See* the Contractors' Joint Motion for Award of Costs and Fees, p. 14. The State, in turn, has filed counter-claims against Hobson for breach of contract, breach of warranty, indemnity, and contribution, as well as cross-claims against SE/Z for breach of contract, breach of warranty, breach of implied warranty of workmanship, breach of the duty of good faith and fair dealing, indemnity, and contribution. The State further filed a third party claim against Rudeen related to Hobson and SE/Z's claims of design error as well as other acts and omissions. On January 10, 2006, Hobson filed a Complaint against numerous employees of the State alleging slander, tortious interference with contractual relations and intentional interference with prospective economic relations. The slander causes of action and the Project causes of action were consolidated.

As a result of extensive motion practice, Hobson's claims against the individual defendants were dismissed pursuant to a partial summary judgment. Further, the Court dismissed direct claims between Hobson and the State. On March 24, 2010, the Court dismissed the State's claim against Rudeen. As a result of the Court's rulings, the only remaining claims were Hobson's claims against SE/Z, and SE/Z's claims against the State for termination for convenience damages.

During the course of the lengthy litigation the Project was rebuilt. During the the rebuild, numerous new and significant defects were discovered, which required additional time, materials and expense above and beyond the original estimate provided by WGI. *See* Affidavit of Counsel in Support of Motion to Disallow SE/Z and Hobson's Joint Motion for Award of Costs and Fees, ("Counsel Aff."), Ex. 1(NCRR's). These additional defects included paint peeling off of the drywall throughout the Laboratory due to insufficient cleaning of the drywall prior to application

of the paint, which resulted in extensive rework and costs. It was further discovered that SE/Z had failed to secure the BioSafety Cabinets in the Labs or properly attach the cabinets in the Lab rooms to the wall, all of which created extremely hazardous conditions had they not been discovered. *Id.*

Substantial motion practice took place during the course of this litigation. Specifically, SE/Z and/or Hobson moved for summary judgment or partial summary judgment on numerous occasions with regard to the State's affirmative claims, offsets and defenses based on various grounds. These motions were denied in 2006, 2007 and 2008 based on genuine issues of material fact and the State was allowed to continue to pursue its claims, offsets and defenses based upon SE/Z and Hobson's defective work.

In October 2008, this case was tried for 11 days until a mistrial was declared. The Court subsequently froze discovery and motion practice but for motions in limine related to trial evidence. In March 2010, the Court heard, over the State's objections, Hobson's Motions in Limine and Motion to Dismiss Rudeen, and subsequently granted the Motion to Dismiss Rudeen and essentially dismissed the State's claims, offsets and defenses as to the Contractors' defective work. Following the Court's rulings, the State and SE/Z entered into their settlement.

III. ARGUMENT

A. HOBSON CANNOT RECOVER ITS COSTS OR FEES AGAINST THE STATE

Prior to even discussing the issue of prevailing parties, Hobson cannot maintain a claim for costs and fees against the State, when Hobson did not recover any payment from the State, and in fact, had each of its causes of action against the State dismissed as a matter of law. Rather, the only cause of action remaining for Hobson was against SE/Z. As such, any attempt

to recover fees by Hobson should be directed to the party it actually had a claim against, SE/Z, and not the State.

Hobson has provided no authority for the position that it should somehow be allowed to recover its substantial costs and fees against the State, when Hobson's claims against the individual defendants and Hobson's claims against the State were dismissed. The only party from which Hobson obtained any relief was SE/Z, the party it contracted with, and the party that terminated its contract.

B. NEITHER HOBSON NOR SE/Z WERE PREVAILING PARTIES

1. Standard

In making a decision regarding any award of costs or attorney's fees, the Court must first consider and determine whether there exists a prevailing party. I.R.C.P. 54(d)(1); International Eng'g Co. v. Daum Indus., Inc., 102 Idaho 363, 630 P.2d 155 (1981) (holding costs and attorney fees are not recoverable under I.R.C.P. 54 where there is no prevailing party).

Idaho Rule of Civil Procedure 54(d)(1)(B) defines a "Prevailing Party" as follows:

In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

The determination of whether there is a prevailing party for purposes of an award of costs or attorney's fees, and if so to what extent, is committed to the sound discretion of the trial court. Polk v. Larrabee, 135 Idaho 303, 17 P.3d 247, 256 (2000); Adams v. Krueger, 124 Idaho 97, 856 P.2d 864, 867 (1993); Cunningham v. Waford, 131 Idaho 841, 965 P.2d 201, 205-206 (Ct. App. 1998). The "trial court is vested with broad discretion to determine the prevailing party in a

multiple claim action.” International Engineering Company, Inc. v. Daum Industries, Inc., 102 Idaho 363, 366, 630 P.2d 155, 158 (1981).

“In determining which party prevailed in an action where there are claims and counterclaims between opposing parties, the court determines who prevailed ‘in the action’ that is, the prevailing party question is examined and determined from an overall view, not a claim-by-claim analysis.” Jorgensen v. Coppedge, 148 Idaho 536, 224 P.3d 1125, 1127 (2010); citing Eighteen Mile Ranch, L.L.C., v. Nord Excavating & Paving, Inc., 141 Idaho 716, 719, 117 P.3d 130, 133 (2005).

The three principal factors to be considered when determining which party, if any, prevailed in a matter are as follows: (1) the final judgment or result obtained in relation to the relief sought; (2) whether there were multiple claims or issues between the parties; and (3) the extent to which each of the parties prevailed on each of the claims or issues. Sanders v. Lankford, 134 Idaho 322, 1 P.3d 823, 826 (Ct. App. 2000). An application of these principals and factors establishes that, in this case, there was no prevailing party to whom costs and attorney fees should be awarded.

There is not always a prevailing party. See Owner-Operator Indep. Drivers Ass’n v. I.P.U.C., 125 Idaho 401, 407, 871 P.2d 818 (1994); Powell v. Sellers, 130 Idaho 122, 130, 937 P.2d 434 (Ct. App. 1997); Weaver v. Millard, 120 Idaho 692, 819 P.2d 110 (Ct. App. 1991). Even where a party obtains a judgment for money, they may not be the prevailing party. See Yellow Pine Water User’s Ass’n v. Imel, 105 Idaho 349, 670 P.2d 54 (1983). In Yellow Pine, the plaintiff, a water association, brought a test case in magistrate court to collect \$234 from a homeowner. At trial, the plaintiff was awarded \$56 in water fees and disconnect charges. The trial court awarded the plaintiff \$318 in costs and \$700 in attorney fees as the prevailing party.

On appeal, the Supreme Court of Idaho reversed the trial court's costs and fees determination and found the plaintiff was not the prevailing party. *Id.* 105 Idaho at 352, 670 P.2d. Specifically, the Supreme Court of Idaho found that the plaintiff "made an excessive demand, i.e., \$384 (amended at trial to \$234), although the proper amount due, i.e., \$26, had been tendered." *Id.* In Adams v. Krueger, the plaintiff recovered damages in a negligence action, but was found to be 49% negligent to the defendants' 51%. The trial court held that although the plaintiff recovered damages, that neither party was a prevailing party, and such decision was upheld on appeal. 124 Idaho 74, 77, 856 P.2d 864 (1993).

Similarly, in Weaver v. Millard, the plaintiff's contractor entered into an oral contract with defendants to construct commercial fish ponds. 120 Idaho 692, 695, 819 P.2d 110, 113 (Ct. App. 1992). The defendant partnership withheld payment of \$18,723.76 to Weaver for work completed after the project's costs exceeded expectations. Weaver filed a lien on the property and brought an action to foreclose the lien. The partnership filed a counterclaim arguing the work was defective. *Id.* After a six day bench trial, the trial court awarded Weaver \$5,813.63 on the contract but refused to foreclose on the lien because his statement of demand failed to account for deductions and just credits. *Id.* 120 Idaho at 696, 819 P.2d at 114. The trial court arrived at the damage award after deducting: \$7,497 paid directly by the defendant to a material supplier on behalf of Weaver; \$1,313.37 for labor overcharges; \$719.76 for concrete overcharges; and \$3,380 for costs to repair Weaver's poor workmanship. *Id.* The trial court determined neither Weaver nor the partnership prevailed at trial and refused to award attorney fees pursuant to I.C. § 12-120. *Id.* In affirming the trial court's decision, the Idaho Court of Appeals stated:

The district court concluded that Weaver and the partnership each prevailed on one of the two issues between them, but that each received far less than the

respective relief they sought. The district court reached these conclusions through an exercise of reason, and the court did not abuse its discretion in concluding that neither Weaver nor the partnership prevailed against the other.

120 Idaho at 702-703, 819 P.2d at 120-121.

In Israel v. Leachman, the plaintiffs brought suit against the defendants alleging violations of Idaho Consumer Protection Act and intentional misrepresentation related to the sale of a manufactured home. 139 Idaho 24, 72 P.3d 864 (2003). A jury determined defendants violated the Consumer Protection Act and awarded \$10,000 in damages. The jury ruled in favor of the defendants with regard to the intentional misrepresentation claim. The district court found that both parties had prevailed in part and not prevailed in part, and did not name either party the “prevailing party.” *Id.* 139 Idaho at 25-26, 72 P.3d at 865-866. On appeal, the Supreme Court of Idaho upheld the lower court’s decision. *Id.* 139 Idaho at 27-28, 72 P.3d 867-868.

In Stewart v. Rice, the plaintiff brought a personal injury action against another skier involved in a collision. 120 Idaho 504, 817 P.2d 170 (1991). The plaintiff sought \$500,000 in damages, including a claim that the ski accident resulted in her having epilepsy. At trial, the jury found that the defendant was 90% at fault for the accident and awarded the plaintiff \$4,504 in damages. *Id.* 120 Idaho at 506, 817 P.2d at 172. In post trial motions, the plaintiff sought an award of costs as the prevailing party. Despite the fact the plaintiff obtained affirmative relief on her claim, the trial court held that there was no prevailing party. *Id.* 120 Idaho at 511, 817 P.2d at 177. On appeal, the Supreme Court of Idaho upheld the trial court’s findings. *Id.*

In Trilogy Network Systems, Inc v. Johnson, the plaintiff brought multiple claims against defendant for breach of contract and damages. 144 Idaho 844, 172 P.3d 1119. At trial, the jury found the defendant breached his contract, but that there were no resulting damages and found that neither party was the prevailing party as the plaintiff had prevailed in part and the defendant

had prevailed in part. The Supreme Court of Idaho upheld a district court's determination that neither party was the "prevailing party," based on its finding the district court reached its decision through the exercise of reason. *Id.* 144 Idaho at 184, 172 P.3d at 1123.

2. Hobson is Not the Prevailing Party Against the State

Hobson cannot be a prevailing party in this action against the State, as its only claims against the State (or the individually named defendants in the consolidated defamation action) were dismissed by the Court. As such, Hobson obtained no affirmative relief by its claims against the State, and in no way prevailed against the State.

In the consolidated actions, Hobson alleged various causes of action against the State including causes of action for defamation, intentional interference with prospective economic advantage, tortious interference with contract, implied warranty and termination for convenience. Each and every one of these causes of action was dismissed by the Court.

Hobson's Complaint against the State attached a Notice of Tort Claim, in which Hobson identified the damages it was seeking against the State at \$1,572,429.44. Hobson has now taken the position that this damage figure was "essentially a 'negotiating' position." *See* Hobson Fabricating's and SE/Z Construction's Joint Motion for Award of Costs and Attorney's Fees, p. 14. However, as the Court remembers, the State and Rudeen were required to file numerous motions to force Hobson and SE/Z to exclude certain items from its damage calculations. Further, every time the State was successful in knocking out an element of Hobson's alleged damages, Hobson would simply identify additional damages that returned its damage figure to roughly the same figure. To wit, the State and Rudeen were successful in excluding Hobson's damage claims for home office overhead (Hobson's home office overhead claims (including its subcontractors) was well over \$250,000). *See* October 31, 2007 Memorandum Decision and

Order). Further, the State and Rudeen were able to eliminate certain other damage items within Hobson's original damage claims including Change Orders 10, 12 and 13. *See* the Court's April 24, 2007 and October 31, 2007 Memorandums Decisions and Orders. In light of these successful attacks on its damage claim, Hobson changed its damage claim to a modified total cost approach and requested damages in excess of \$1,320,000. *See* Counsel Aff., Ex. 2 (Hobson's Trial Exhibit 1182).

As such, in evaluating whether Hobson is the prevailing party against the State, the Court must examine the various claims between those parties. As mentioned above, Hobson asserted claims against the State and the individual defendants based upon tort and contract. These claims were dismissed, and Hobson did not obtain any affirmative relief on these claims. The State filed claims against Hobson related to its work on the BSL 3 Lab, and such claims were dismissed without affirmative relief. As such, the State defeated all claims asserted by Hobson and Hobson defeated all claims asserted against it by the State.

The State did not pay any money to Hobson in its settlement of this action. Rather, after the Court's rulings on Hobson's dispositive motions in March 2010 eliminating the State's Counterclaim, offsets and defenses against SE/Z, the State, without admitting liability, made a business decision to settle the remaining action with SE/Z for payment of \$225,000. Based upon information and belief, the State understands \$90,000, of that amount was paid to Hobson by SE/Z. Regardless of what SE/Z chose to do with the settlement funds, it does not change the fact that Hobson did not recover any relief from State, and in no way prevailed against the State in this action. Further, Hobson's recovery in this case of \$90,000, is less than 6% of its original demand requested in its Complaint.

3. Hobson Did Not Prevail Against the State

In an attempt to ignore the fact Hobson did not prevail on any of its claims against the State, Hobson filed a joint motion for an award of costs and attorneys' fees asserting, without any authority, it is entitled to an award of costs and fees against the State because the "Contractors" obtained a \$225,000 settlement and defeated the State's counterclaim. The State did not pay Hobson any money as a result of Hobson's claims against the State.

Rather, to the extent Hobson is a prevailing party, it is a prevailing party against SE/Z, the only party against which it had a viable claim, and obtained actual relief. Even in that regard, Hobson is believed to have recovered only \$90,000 of its original and excessive demand of \$1,572,429.44 (less than 6%).

This Court ruled that Hobson was precluded from asserting its Project claims against the State of Idaho based upon a lack of privity. To allow Hobson to assert claims for costs and attorney fees would be allow Hobson to do in this motion what it could not in the case, that is, bring claims directly against the State.

4. SE/Z Did Not Prevail Against the State

SE/Z filed a cross claim against the State related to the Project. Specifically, SE/Z filed breach of contract, breach of the implied duty of good faith and fair dealing, and third party liability claims against the State. The State filed a counter cross-claim against SE/Z, which included claims against SE/Z for breach of contract, breach of warranty, breach of implied warranty of workmanship, breach of the covenant of good faith and fair dealing, indemnity and contribution related to the defective construction of the BSL 3 Lab. SE/Z sought \$1,973,107.38 against the State in its cross claim. The State's counter cross-claim against SE/Z sought recovery of money the State was forced to expend to secure a working and safe BSL 3 lab. A Lab for

which the state had already paid SE/Z \$1,362,329.00² at the time it terminated SE/Z's contract for convenience. Subsequently, via its hiring of Washington Group International, the State learned of serious and significant defects and gross deviations from the plans in the construction of the Lab by SE/Z and its subcontractors that resulted in a non-functioning and unsafe Lab. The estimate provided by WGI to bring the Lab into working order was \$1,563,138. As the work on the Lab continued additional items of grossly deficient and defective work was discovered, which lead to increased work in order to bring the Lab into working order. The State was prepared to present evidence of the grossly deficient work, including pieces of duct work, malfunctioning dampers, bags of peeled off paint, videos of poorly welded duct work and hundreds and hundreds of photographs depicting deficient conditions of the Lab as constructed by SE/Z and its subcontractors, including: acid drain pipes that had holes drilled into it; ceiling hangers secured by wrapped wire resulting in waiving ceilings; cabinets meant to hold potentially toxic materials attached to walls via molly bolts in drywall instead of metal backing; damaged hepa filters; and other non-conformities. *See Counsel Aff., Ex. 1.*

Just prior to the second trial in this matter, the Court dismissed the State's counter-claims against SE/Z, and as a result, the State, without admitting liability, settled with SE/Z for \$225,000.

As noted in the Joint Brief, SE/Z's original claim in this matter sought damages in the amount of \$1,973,107.38. As in the Yellow Pine Case, this amounts to an excessive demand. 105 Idaho 349, 670 P.2d 54 (1983). Once its counter cross-claim was dismissed, the State settled the case with SE/Z for \$225,000 or 11.4% of its original demanded amount. As such, the State was successful in defending against 88% of SE/Z's alleged damages. SE/Z's minimal recovery

² The State retained 5% of payments on the Project as well as the final pay request from SE/Z for a total of \$95,155.00.

on its causes of action weigh against a determination that it was a prevailing party. See Israel v. Leachman, Yellow Pine and Stewart v. Rice above. Rather, the Court should find that neither SE/Z nor the State were the “prevailing party” as the State prevailed in its defense of 88% of SE/Z’s claimed damages and SE/Z obtained a dismissal of the State’s counter cross-claim.

C. COSTS AS A MATTER OF RIGHT

The State strongly believes that neither Hobson nor SE/Z were the prevailing party in this matter, and that no costs should be awarded as a matter of right and objects to each of the costs below on such grounds. However, in the event the Court determines SE/Z prevailed against the State or that Hobson prevailed against the State, the State disputes certain costs claimed as a matter of right on additional grounds. The State will provide only its specific objections to these costs.

1. Filing Fees: It appears Hobson is seeking \$711.87 for its Filing Fees, which includes *pro hac vice* requests for former Hobson counsel Tyler Storti of Stewart Sokol & Gray and current Hobson attorneys Todd Henry and Traeger Machetanz for a total of \$600, in addition to a filing fee of \$111.87 on March 5, 2010.

Idaho Rule of Civil Procedure 54(d)(1)(C)(1) does not contemplate *pro hac vice* admissions as costs that may be recovered as a matter of right. Hobson was not required to retain out of state counsel, but rather made a conscious decision to hire out of state counsel and such costs are not recoverable as a matter of right.

Hobson’s remaining cost of \$111.87 from March 5, 2010 is not explained. A review of the docket sheet identifies Notices of Hearing being filed, but nothing else. The cost of \$111.87 is not recoverable as a matter of right.

SE/Z seeks \$60 for which the State has no specific objections.

2. **Deposition Costs:** The State does not have any specific objections to the deposition costs claimed in this matter.

3. **Service of Process Costs:** Hobson identifies \$4,245.13 in service of process costs in this action. The vast majority of this amount is Federal Express Charges (\$3,202.38) for filing motions and memorandums with the Court and providing the same to parties, and are not recoverable under I.R.C.P. 54(d)(1)(C)(2). The State further objects to the costs identified by Hobson for service of subpoenas in the amount of \$1,042.75. Of that amount \$273.75 was charged to serve YMC and another \$168.50 was charged to serve WGI. The State would and could have arranged for acceptance of service on these two entities and had named individuals from both companies as experts in the case. The remaining amounts alleged for service of process are not clearly identified and should be denied.

SE/Z seeks \$55 for service of process. The Joint Motion for Award of Costs and Fees fails to identify what this cost was for and it should be denied.

4. **Experts:** Hobson appears to seek \$4,000 in experts' fees as a matter of right for its experts Stephen Wiggins and Gerald Williams. The State has no specific objections to this amount. However the Joint Motion states Hobson seeks \$8,000 in experts' fees as a matter of right, including \$2,000 for YMC, which was used as an expert by the State, which the State would clearly object to.

SE/Z seeks \$2,000 in experts' fees as a matter of right for its expert David Kopmeyer. Idaho Rule of Civil Procedure 54(d)(C)(8) provides that a prevailing party is allowed to recover reasonable expert witness fees for an expert who testifies at court or in deposition. As explained briefly here, and in more depth below under discretionary costs, Mr. Kopmeyer's fees are not reasonable based upon the fact he admitted during his deposition that although he alleged

numerous issues and delays on the Project were attributable to the State or Rudeen, he was unable to explain of these delays or how they impacted the schedule for the Project. Further, Mr. Kopmeyer was the subject of a motion to in limine filed by Rudeen in this matter. At the hearing to March 31, 2008, counsel for SE/Z stated SE/Z would not be calling Mr. Kopmeyer to testify at trial and the motion to strike was denied. The State argues that Mr. Kopmeyer's fees in this case are not appropriate or reasonable and should be disallowed as both costs as a matter of right and discretionary costs.

5. Preparation of Exhibits: SE/Z and Hobson each request \$500 in costs as a matter of right for costs of producing exhibits. However, neither SE/Z nor Hobson provide a breakdown of costs associated with admitted exhibits. Rather, they just make unsupported allegations that they should be awarded the full amount under the Rule. IRCP 54(d)(1)(C)(6) provides:

Reasonable costs of the preparation of models, maps, pictures, photographs, or other exhibits **admitted in evidence** as exhibits in a hearing or trial of an action, but not to exceed the sum of \$500.00 for all of such exhibits of each party.

(emphasis added). The Idaho Court of Appeals has previously held that exhibits prepared, but not admitted, could not be claimed as non-discretionary costs. George W. Watkins Family v. Messenger, 115 Idaho 386, 391, 766 P.2d 1267, 1272 (Ct. App. 1988) ("In the memorandum of costs the lessors claimed \$139.95 for the preparation of blueprints used as exhibits at trial. The exhibits were not admitted as evidence. Therefore, the lessors are not entitled, as a matter of right, to these costs."). In this matter, Hobson and SE/Z failed to provide any breakdown as to what exhibits were admitted and the costs associated with each.

D. HOBSON AND SE/Z ARE NOT ENTITLED TO DISCRETIONARY COSTS

In Idaho, the prevailing party in a civil action may also be entitled to a recovery of

discretionary costs under IRCP 54(d)(1)(D), subject to objection by the adverse party and the Court's own determination of appropriateness of such an award:

(D) Discretionary Costs: Additional items of cost not enumerated in, or in an amount in excess of that listed in subparagraph (C), may be allowed upon a showing that said costs were **necessary and exceptional** costs **reasonably** incurred, and should **in the interest of justice** be assessed against the adverse party. The trial court, in ruling upon objections to such discretionary costs contained in the memorandum of costs, shall make express findings as to why such specific item of discretionary cost should or should not be allowed. In the absence of any objection to such an item of discretionary costs, the court may disallow on its own motion any such items of discretionary costs and shall make express findings supporting such disallowance.

(emphases added). More simply stated, a party must demonstrate four elements to permit the award of discretionary costs as against an adverse party:

- 1) That the costs were necessary;
- 2) That the costs were exceptional;
- 3) That the costs were reasonable;
- 4) That the costs should, in the interest of justice, be assessed against the adverse party.

The Idaho Supreme Court, in affirming a district court's ruling in denying a claim for discretionary costs, has stated that "although [the court] did not evaluate the costs item by item, it did make express findings as required by I.R.C.P. 54(d)(1)(D) with regards to the general character of the requested costs." Fish v. Smith, 131 Idaho 492, 494, 960 P.2d 175, 177 (1998)(quoting Roe v. Harris, 128 Idaho 569, 917 P.2d 406 (1996)).

The Idaho Supreme Court, as discussed above, has found FRCP 54 analogous to IRCP 54 in regards to claims for costs. Thus, although different, the overarching principles with respect to awards of costs remain the same. Under federal law, courts are afforded some discretion in the award of costs. However, this discretion does not constitute *carte blanche* for the prevailing party. See, e.g., Firestine v. Parkview Health System, Inc., 374 F. Supp. 2d 658, 672 ("As the Supreme Court has explained, Rule 54(d) does not give a court 'unrestrained discretion to tax

costs to reimburse a winning litigant for every expense he has seen fit to incur ... [I]terms proposed by winning parties as costs should always be given careful scrutiny.”)(citing Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 235, 85 S. Ct. 411, 13 L. Ed. 2d 248 (1964); Thomas v. Treasury Management Ass’n, Inc., 158 F.R.D. 364, 371-72 (D. Md. 1994)(“While Rule 54(d)(1) provides that, after entry of final judgment, ‘costs shall be allowed as of course to the prevailing party,’ the trial court possesses broad discretionary powers to allow or disallow them. . . . This, however, does not permit a district court to order a losing party to reimburse a prevailing party for every expense the latter may have incurred.”)(internal citations omitted). Additionally, claims for overhead costs are not taxable. See, e.g., Abbott Laboratories v. Granite State Ins. Co., 104 F.R.D. 42, 44 (D. Ill. 1984)(“a litigant is not entitled to saddle the opposing party with overhead expenses under the guise of taxable costs[.]”).

The Idaho Supreme Court has recognized that some costs are simply the nature of modern litigation, and the nature of the litigation does not necessarily dictate the result with respect to discretionary fee awards:

While Seubert and Intervenor agree their case may not be exceptional when compared to other condemnation cases, nevertheless they argue that multimillion dollar condemnation cases are exceptional in themselves, requiring extensive expert testimony and use of exhibits and models.

A court may evaluate whether costs are exceptional within the context of the nature of the case. *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005) (holding that the trial court's denial of expert fees was not an abuse of discretion where “the trial court considered the nature of [the] case as a class action and its effect on numerous Idaho businesses and found that although expert witnesses were necessary and their fees reasonable, the costs were not exceptional for a class action suit”); accord, *Fish*, 131 Idaho at 493-94, 960 P.2d at 175-76 (holding that the trial court's denial of expert witness fees was not an abuse of discretion where it found the costs were necessary and reasonable, but were not “exceptional” because “the vast majority of litigated personal injury cases ... routinely require an assessment of the accident and the alleged injuries by various sorts of doctors of medicine, accident reconstructionists, vocational experts and so on”). In this case, the trial court found that Seubert's and

Intervenors' costs are **“routine costs associated with modern litigation overhead”** in a condemnation case. The trial court did not abuse its discretion in denying the claim for discretionary costs.

City of McCall v. Seubert, 142 Idaho 580, 588-89, 130 P.3d 1118, 1126-27 (2006)(emphasis added). Equally is true in the present litigation – many of the costs are simply routine costs associated with modern litigation overhead, which is not appropriately taxed to plaintiffs. *See also Hayden Lake Fire Protection District v. Alcorn*, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005)(“Certain cases, such as personal injury, cases [sic] generally involve copy, travel and expert witness fees such that these costs are considered ordinary rather than ‘exceptional’ under I.R.C.P. 54(d)(1)(D).”)(citing Inama v. Brewer, 132 Idaho 377, 384, 973 P.2d 145, 155 (1999)).

Hobson and SE/Z make the argument that all of their claimed discretionary costs were exceptional based on the “unique set of facts” of this case related to the termination for convenience and the technical nature of the HVAC issues involved. Hobson and SE/Z further argue that the State’s claims against Rudeen added to the complexity of this case and required extensive additional discovery. SE/Z and Hobson forget that it was their own claims in this case alleging defective design that resulted in Rudeen being named as a party in this case, and fueled the discovery regarding the same, not any allegations made independently by the State.

The State concedes that the facts of this case were unique. However, such uniqueness does not in and of itself make this an exceptional case. Hobson and SE/Z cite to Swallow v. Emergency Medicine of Idaho, P.A. for the proposition that “Idaho authority demonstrates that in cases where expert testimony is essential to the establishment of the claims, a determination that the matter is ‘exceptional’ for the award of I.R.C.P. 54(d)(1)(D) discretionary costs is proper.” *See* Joint Motion p. 31. Hobson and SE/Z fail to grasp the concept of Swallow, as the case stands for the exact opposite finding. Swallow involved claims for medical malpractice

against Dr. Blahd. Dr. Blahd prevailed in the action on summary judgment and submitted a request for his costs, including discretionary costs for three experts who were retained but did not testify in deposition or trial. The district court granted these costs to Dr. Blahd. On appeal, the Supreme Court of Idaho reversed the district court's award of discretionary costs because the district court had failed to address how awarding such costs was in the interests of justice. 138 Idaho 589, 598, 67 P.3d 68, 77 (2003).

Idaho Courts have recognized modern litigation includes large sums of money at stake, substantial copying costs, discovery costs, travel costs and expensive experts. See Inama v. Brewer, 132 Idaho 377, 384, 973 P.2d 148, 155 (1999). In Inama, the district court denied discretionary costs after it determined that a party's expert witness fees were reasonable and necessary, but were not exceptional.

In Hayden Lake Fire Protection District v. Alcorn, 141 Idaho 307, 109 P.3d 161 (2005), the Supreme Court of Idaho affirmed a lower court's determination that additional expert fees in a large class action business litigation action were not recoverable as discretionary costs because expert fees in such cases are routine, stating "In this case the district court found that the outcome could affect over one thousand local business and involve potential damages of over \$50,000,000.00. This description adequately portrays the magnitude of the suit and suggests that the district court found the need for expert witnesses an essential but ordinary part of such litigation. Complex business litigation often relies on expert witnesses to explain alternative management schemes and/or financing. The district court's denial of SIF's additional expert witness fees was not an abuse of discretion." *Id.* 141 Idaho at 315-316, 109 P.3d at 169-170. Similarly, in Fish v. Smith, 131 Idaho 492, 960 P.2d 175 (1998), the Idaho Supreme Court again affirmed a district court's denial of discretionary costs after finding that additional expert costs,

travel costs, copying costs and other such costs were reasonable and necessary, but that they were not exceptional, and in fact were routine in personal injury actions. 131 Idaho at 493, 960 P.2d at 176.

1. This Was Not an Exceptional Case

The instant action involved claims of breach of contract, breach of warranty (including deficient design), breach of the implied duty of good faith and fair dealing, third party liability and termination for convenience against the State related to work on the BSL 3 Laboratory. The State brought actions against SE/Z and Hobson once it was discovered that the work they performed on the Project was deficient and in numerous instances a gross deviation from the plans and specifications. The State also brought a third party action against Rudeen for indemnity, contribution and breach of contract based upon the allegations made by Hobson and SE/Z in their complaints. As such, this was a case involving a State funded project, involving numerous parties regarding breach of contract and construction defects. Such cases are by their very nature, large and complex. These types of cases routinely involve overwhelming amounts of documentation, extensive discovery, travel, electronic research, a multitude of technical issues involving the type of work performed and alleged defects, and require substantial expert testimony to establish and defeat claims of defective work and or delays. Stated in more simple terms, this was not an exceptional breach of contract/construction defect case, and SE/Z and Hobson's claims for discretionary costs are not exceptional, and should be disallowed in total.

2. Some of the Claimed Discretionary Costs Were Not Necessary or Reasonable

In addition to being required to establish the costs were exceptional, SE/Z and Hobson must also establish their claimed discretionary costs were necessary and reasonable. Again, the State does not believe SE/Z or Hobson can establish that any of the claimed discretionary costs

were exceptional, but to avoid repetition will not readdress those arguments with each item claimed, and will instead focus on whether such claims were necessary or reasonable.

Expert Fees	<u>SE/Z</u> \$68,674.42 for Mr. Kopmeyer	<u>Hobson</u> \$69,508.29 for Dr. Williams and Mr. Wiggins
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SE/Z seeks an additional \$68,000 in discretionary costs associated with its retention of Mr. Kopmeyer. Mr. Kopmeyer was identified by SE/Z to testify regarding SE/Z's damages in this matter. *See* SE/Z's Expert Witness Disclosures filed on June 18, 2007. As the Court recalls, the State moved to strike Dr. Kopmeyer's expert testimony based on SE/Z's failure to disclose actual opinions rather than merely state the REA contained accurate damage figures (as well as a spreadsheet of damages). Rudeen subsequently filed two Motions in Limine to exclude Mr. Kopmeyer's testimony based upon his deposition testimony, in which he testified the entire 332 days of delay were attributable to the State and Rudeen based upon an As-Built Schedule he created. However, Mr. Kopmeyer also testified he could not locate the As-Built schedule he allegedly created and was unsure if he had ever printed it off. When asked specifically about the various items of delay alleged on the Project, Mr. Kopmeyer testified he was unable to explain how any series of events resulted in the 332 days of Project delay or how he got to 332 days of delay in the first place. *See* Counsel Aff Ex. 3 (Mr. Kopmeyer Deposition), pp. 126-128, 170-171. As the Court recalls, at the hearing on Rudeen's Motion in Limine to exclude Mr. Kopmeyer from testifying on September 29, 2008, counsel for SE/Z stated on the record that Mr. Kopmeyer would not be testifying at trial.

As such, Mr. Kopmeyer billed over \$70,000 in expert fees on this matter to create an As-Built schedule and determine damages and delay. However, based upon his inability to locate the actual schedule he created, or recall the basis for his opinions on causes of delay, he was not

called to testify at trial. As such, the State believes the discretionary costs claimed by SE/Z for its expert Mr. Kopmeyer are not reasonable and should be disallowed.

Hobson's expert Dr. Williams was similarly retained to provide expert testimony regarding Hobson's damages in this action. Originally, Dr. Williams was disclosed as opining that the costs as identified in the REA were true and correct. A motion to strike Dr. Williams' expert opinion for failing to provide actual opinions or the basis thereof was filed. Following the hearing on the motion, Dr. Williams submitted a new report indicating that after careful review of the REA, the damages contained therein were not able to be tied to the actual records available. *See* Counsel Aff., Ex. 4 (Deposition of Dr. Williams), pp. 18-19 and 31-32. Based upon such findings, Dr. Williams completely revised his opinion and implemented the adjusted total cost approach of damage calculation to arrive at a new damage figure for Hobson. *Id.* *See also* Ex. 2.

In March 2010, the Court issued a ruling denying Hobson's motion to seeking a ruling preventing the State from disputing Hobson's right to employ the total cost method of damage calculations. *See* March 26, 2010, Memorandum Decision and Order on Plaintiff's Motions in Limine. The Court expanded on this ruling in its subsequent April 2, 2010, Memorandum Decision and Order on Motion to Reconsider, Motions for Clarification and Motions in Limine, wherein it stated:

The Court specifically rejects the contention that the clause converts the fixed price contract into a cost-plus contract. The Court finds that the Contractors are not entitled under a termination for convenience to receive the money they would not have received if the contract had been completed. The Court further finds the term "Work" does not include all costs incurred by the Contractors, but only includes "construction and services required by the Contract Documents" or, to be specific, the work done under the contract in accordance with the plans and specifications for which the Contractors have not been paid and for which they would have been paid had the contract gone to completion.

Id. at p. 7.

As such, Dr. Williams' theory of total cost approach to damages – his entire basis of testimony – was specifically rejected by the Court.

Based upon this fact, the State argues that the costs associated with Dr. Williams' expert testimony were not necessary or reasonable and should be disallowed as discretionary costs.

	<u>SE/Z</u>	<u>Hobson</u>
Telephone, Fax, Postage, Fed Ex	\$810.16	\$2,721.06

The majority of Hobson's costs (\$2,661.46) are charges for Federal Express deliveries of motions and memorandums to the Court and counsel. These costs are again a function of Hobson hiring out of state counsel and these costs are not necessary nor are they reasonable when such documents could have been completed earlier and mailed timely. Further, such costs are more attributable to being normal overhead as opposed to exceptional costs.

	<u>SE/Z</u>	<u>Hobson</u>
Travel and Lodging	\$22,857.54	\$46,629.87

The majority of these costs were incurred by Hobson and SE/Z for the simple fact each chose to retain counsel out of state (Hobson by hiring counsel from Seattle and Portland) or out of the area (SE/Z retained Mr. Hahn from Idaho Falls) in which the case was filed and pursued. It was not necessary for SE/Z or Hobson to retain out of town counsel to try this case. Parties are entitled to choose their own counsel, but the State should not be punished by the fact SE/Z and Hobson elected to retain out of area experts.

	<u>SE/Z</u>	<u>Hobson</u>
Photocopy	\$2,380.26	\$72,298.81

Hobson has not provided any explanation as to how they incurred \$72,298.81 in copying costs and these costs on their face do not appear to be necessary or reasonable. The

documentation from SE/Z and Hobson is unclear as to what documents were copied, who did the copying or what the rate was. Further, it is unclear whether Hobson ended up copying the same documents multiple times due to its change in counsel. The State requests the Court deny these costs in total as they have not been established as necessary or reasonable.

	<u>SE/Z</u>	<u>Hobson</u>
Deposition Summary Preparation		\$5,365.26

It appears Hobson's counsel elected to have numerous depositions summarized by an outside service in preparation for trial of this case. This cost does not appear to be necessary or reasonable. Hobson's new counsel began billing on this case in late May 2009. As such, there was ample time to have deposition summaries prepared in-house. Further, summarizing deposition transcripts is traditionally a function of attorneys or paralegals, and attempting to include these expenditures as costs is an attempt to improperly recover attorney fees as discretionary costs.

	<u>SE/Z</u>	<u>Hobson</u>
Discovery Costs	\$613.66	

SE/Z has failed to identify what this cost was for, let alone how it was necessary and reasonable, and this cost should be denied.

	<u>SE/Z</u>	<u>Hobson</u>
Miscellaneous	\$968.83	\$3,207.93

SE/Z and Hobson have failed to identify what specifically these costs represent or how they were necessary and reasonable and these costs should be denied.

3. The Interests of Justice are Not Furthered by Assessing Discretionary Costs Against the State.

The final requirement SE/Z and Hobson must establish in order to recover discretionary

costs is that the costs should, in the interests of justice, be awarded against the State. However, a review of this matter as a whole reveals that the interests of justice do not warrant imposition of these costs against the State.

SE/Z and Hobson have made repeated references to the State's refusal to make an offer once they received the REA back in 2005. However, as noted by the Court in the recent hearing in March 24, 2010, this is a case where the Project was essentially completed and the parties were at a standstill with each other. The State made a decision to terminate SE/Z for convenience with the expectation of receiving a final billing on the Project to include retention and recently completed unpaid work in a fairly insignificant amount (an amount less than \$100,000). However, instead of receiving such a reasonable demand, the State was provided a Request for Equitable Adjustment seeking an excessive amount of nearly two million dollars, almost one and one half times the amount of SE/Z's original contract. *See Counsel Aff., Ex. 5* (March 24, 2010 hearing transcript), p. 51. Further, the State then discovered that work performed on the Project was defective and grossly deficient from the plans and specifications, and that it would cost more than a million dollars to repair such work and provide a working bio safety laboratory and subsequently filed claims back against SE/Z and Hobson.

The interests of justice would be no means furthered if Hobson and SE/Z were rewarded with an amount of discretionary costs in this matter against the State. Hobson and SE/Z performed defective work on a BSL-3 Laboratory and were paid for such work. SE/Z and Hobson subsequently made grossly inflated demands upon the State related to the State's decision to terminate SE/Z for convenience in an effort to bring an amicable end to the Project. This set of facts does not warrant an award of discretionary costs.

E. SE/Z AND HOBSON ARE NOT ENTITLED TO RECOVER ATTORNEY FEES

The State acted with a reasonable basis in fact and law in defending against the claims alleged against it by SE/Z and Hobson and in pursuing its own claims back against the contractors, and SE/Z and Hobson are not entitled to an award of attorney fees.

1. Standard

Idaho Code § 12-117 is the exclusive means for awarding attorney fees against the State. See I.C. § 12-117, Potlatch Education Ass'n v. Potlatch School District No. 285, 226 P.3d 1277 (Idaho 2010), *see also* Westway Const., Inc. v. Idaho Transp. Dep't, 139 Idaho 107, 116, 73 P.3d 721, 730 (2003) (citing State v. Hagerman Water Right Owners, Inc., 130 Idaho 718, 723, 947 P.2d 391, 396 (1997))(stating that § 12-117 is the exclusive basis for seeking attorney fees against a state agency). The purpose of I.C. § 12-117 is: 1) to serve as a deterrent to groundless or arbitrary action; and 2) to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies should never have made. *See* Rincover v. State Department of Finance, 132 Idaho 547, 549, 976 P.2d 473, 475 (1999).

Idaho Code § 12-117 requires a showing that the State “acted without a reasonable basis in fact or law.” A defense is not frivolous or groundless simply because it fails. *See* Lowery v. Board of County Com'rs for Ada County, 115 Idaho 64, 764 P.2d 431 (1988).

2. The State Had a Reasonable Basis in Fact and Law to Bring its Claims, Offsets and Defenses

The State had a reasonable basis in fact and law to pursue its claims, setoffs and defenses against Hobson and the State. The State filed a counter-cross claim against SE/Z and a counter-claim against Hobson based upon discovery of construction practices that were defective and in gross disregard to the Project plans and specifications performed by SE/Z and Hobson, that were

discovered after the State terminated SE/Z for convenience. As discussed above, the contractors work on the Project was in gross disregard to the construction plans and specifications and resulted in an unsafe laboratory that would have posed grave danger to the employees of the laboratory as well as individuals who work or live near the Project. Based upon the defective work that was not discovered until after SE/Z was terminated, the State's decision to pursue its claims, offsets and defenses was entirely reasonable.

3. The State Had a Reasonable Basis to Continue to Pursue its Claims, Offsets and Defenses

At the outset of this case on April 24, 2006, SE/Z and Hobson brought motions to preclude the State from asserting its defenses, offsets and counterclaims in this matter based upon the termination for convenience. As the Court recalls, the Contractors relied exclusively on federal case law in their motion. In opposition, the State filed numerous affidavits: of counsel; Jan Frew; Elaine Hill; Joe Rutledge and Albert Munio as well as a Memorandum in Opposition, which are included herein by reference, outlining the factual and legal basis for its defenses, offsets and claims. As for the specific facts, the affidavits outlined the history of the Project, problems that arose on the Project, the difficulties the State had with regard to welding issues and others, the Project stalling due to inability to obtain balance, the termination of SE/Z for convenience and the subsequent discovery of the grossly defective work performed by Hobson and SE/Z. As for the reasonable basis in law, the State alluded to paragraph 13.4.2 of the SE/Z and State Contract which provided that no action on the part of the parties, such as a termination of the Contract, would constitute a waiver of the parties' rights under the Contract. As such, the Contract itself indicated the State's decision to terminate the Contract for convenience did not preclude the State from asserting other rights under the contract, including breaches, defenses and offsets.

Further, the federal case law relied upon by the Contractors in seeking summary judgment provide a reasonable basis for the State to pursue its claims, offsets and defenses. Even under the strictest federal cases dealing with termination for convenience, the case law has held “that alleged deficiencies stemm[ing] from gross disregard by appellant of its contractual obligations [and] the costs of performing such grossly deficient work would be considered unreasonable and hence unallowable” following a termination for convenience. *See, e.g., New York Shipbuilding*, 1972 WL 1601, 73-1 BCA P 9852; *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759 (Fed. Cir. 1987). Under such cases, the costs of performing work are not allowable where “the government established that any defects resulted from [the contractor’s] gross disregard of its contractual obligations or that any defects are so extensive as to render [the contractor’s] costs unreasonable.” *Best Foam Fabricators, Inc. v. United States*, 38 Fed. Cl. 627, 641 (Fed. Cl. 1997). Even the case upon which Hobson and SE/Z most heavily relied upon in their memoranda in support, *New York Shipbuilding*, provides for an exception allowing for offset when “it is established that the defective production resulted from the contractor’s own fault or folly or careless conduct of the work or other disregard of his contractual duties.” *New York Shipbuilding*, 1772 WL 1601, 73-1 BCA P 9852. The same reasoning applies to affirmative claims stemming from such grossly deficient, unreasonable, grossly non-conforming, and extensively defective work. *See E.A. Cowen Construction*, 1966 WL 651, 66-2 BCA P 6060.

After reading the extensive briefing and hearing oral argument, the Court denied the Contractors’ Motion to preclude the State’s claims, offsets and defenses. In ruling on the

motion, the Court stated “Subparagraph 13.4.2 preserves the State’s right to sue Hobson and SE/Z for breach of contract in connection with their alleged deficient workmanship.”³

As the case proceeded, Hobson brought a motion for partial summary judgment, arguing that the State’s claims, offsets and defenses were precluded for failing to strictly comply with the notice provisions set forth in the Contract.

On January 4, 2007, the Court heard argument on Hobson’s motion for partial summary judgment on the State’s counterclaims, offsets and defenses. The State opposed the motion with a reasonable basis in fact and law. Specifically, the State argued and provided evidence establishing actual notice was given to SE/Z and Hobson with regard to at least portions of the defective work and that neither SE/Z nor Hobson were prejudiced by not having received notice that strictly complied with the Contract provisions. The State further cited to Idaho precedent holding that strict compliance with contractual notice requirements is not always required, including in situations with actual notice and a lack of prejudice. *See Quinn v. Hartford Accident & Indemnity Co.*, 71 Idaho 449, 452, 232 P.2d 965, 966 (1951) and *Leach v. Farmer’s Automobile Interinsurance Exchange*, 70 Idaho 156, 161, 159, 213 P.2d 920, 922-23 (1950).⁴ In denying Hobson’s motion, the Court noted “DPW has raised genuine issues of fact regarding whether or not SE/Z received actual notice of the allegations contained in the complaint and whether or no SE/Z was prejudiced by the lack of strict complaint. See Defendant State of Idaho’s Opposition to SE/Z Construction, LLC’s Motion for Partial Summery Judgment and Plaintiff Hobson Fabricating Corp.’s Joinder in SE/Z’s Motion, p. 17-22 (summarizing numerous

³ 13.4.2 states: “No action or failure to act by the Owner, Architect or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval or acquiescence in a breach thereunder, except as may be specifically agreed in writing.”

⁴ The State hereby incorporates its Memorandum and Affidavits in Opposition to Hobson’s Motion for Partial Summary Judgment.

affidavits that create genuine issue of material fact over whether or not SE/Z had actual notice of the alleged breaches of contract and whether or not SE/Z suffered any prejudice by not receiving notice in strict compliance with the contract.” Alternatively, the Court further noted that even under a strict compliance standard, a genuine issue of material fact existed as to whether SE/Z waived its right to strict compliance by having knowledge of the defective work and deceptively masking the same. Specifically, it appeared the Contractors had known and hid defective work.

On March 19, 2007 SE/Z filed a Motion to Reconsider the Court’s February 27, 2007 ruling on the Notice issue. In denying the motion for reconsideration, the Court stated:

The contractors also presented deposition testimony of certain people who were themselves unaware of any deceptive attempts on the part of the contractors to hide poor workmanship. However, the State presented evidence that inspections after the termination of the contract unveiled serious concealed defects with the contractor’s work. Thus, SE/Z and Hobson have not eliminated the questions of fact that preclude the granting of the Motion for Summary Judgment.

SE/Z filed a motion in limine on September 12, 2008 requesting the Court require the State to show it provided actual notice and an opportunity to cure defective work to SE/Z prior to allowing any presentation of the State’s claims. The Court denied this motion as an untimely motion for summary judgment. Subsequently, SE/Z filed a motion for reconsideration which was further denied based upon the showing made by the State of actual notice, lack of prejudice and SE/Z’s waiver of strict compliance.

In mid October 2008, the case proceeded to trial and a mistrial was declared prior to the State’s opportunity to put on its case in chief, and establish the facts necessary to support its claims, offsets and defenses. The Court further ordered a freeze on discovery and motion practice other than motions in limine regarding evidence issues. As such, the case remained essentially dormant until March 2010, at which time Hobson filed its Motions in Limine and Motion to Dismiss Rudeen, wherein the Court granted Hobson’s motion in limine and precluded

the State from asserting any claim, offset or defense with regard to defective work discovered after the termination for convenience.

4. The Fact the State's Claims Were Dismissed Does Not Make them Unreasonable

The State had a reasonable basis in fact and law to file and assert its claims, offsets and defenses in this action. Specifically, the Contractors performed grossly defective work on the Project that was not discovered until after SE/Z was terminated for convenience. Federal case law discussing terminations for convenience provided that certain exceptions to the general rule would allow an owner to assert damages and/or offsets against a contractor terminated for convenience when the work performed by the contractor was defective and payment of additional funds would not be "reasonable." The Contract provided that a termination for convenience did not preclude the State from pursuing its other rights under the contract, including its right to allege breach of contract and assert offsets. Finally, Idaho law held that strict compliance with notice provisions were not required if it could be shown that actual notice was given and that such actual notice did not prejudice the opposing party. On repeated occasions, the Court ruled in the State's favor on each of the above issues, finding that genuine issues of material fact existed as to each of these matters.

Unfortunately for the State, it was not allowed to present its evidence to a jury in this matter. However, the mere fact that the State's claims, offsets and defenses related to defective work were not successful, it does not mean they were without reasonable basis in fact or law, and the Contractors are not entitled to attorneys fees.

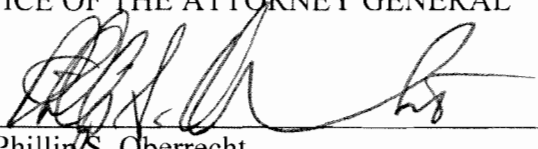
IV. CONCLUSION

Based on the foregoing, the State respectfully requests the Court disallow the entirety of the costs and fees claimed by SE/Z and Hobson in this matter.

DATED this 9th day of July, 2010.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By


Phillip S. Oberrecht
Special Deputy Attorney General
Of the Firm Hall, Farley, Oberrecht
& Blanton, P.A.
Attorneys for Defendant State of Idaho,

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of July, 2010, I caused to be served a true copy of the foregoing **THE STATE OF IDAHO'S MEMORANDUM IN SUPPORT OF MOTION TO DISALLOW RUDEEN & ASSOCIATES, LLC'S MEMORANDUM OF COSTS AND FEES/MOTION FOR COSTS AND FEES**, by the method indicated below, and addressed to each of the following:

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Cosho Humphrey, LLP
800 Park Blvd., Ste. 790
Boise, ID 83712
Fax No.: (208) 338-3290

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Frederick J. Hahn, III
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477 Shoup Ave. Suite 107
P. O. Box 50698
Idaho Falls, Idaho 83405
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☒ Telecopy


Phillip S. Oberrecht

FILED
AM 10 PM

JUL 30 2010

J. DAVID NAVARRO, Clerk
By KATHY J. BIEHL
DEPUTY

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Attorneys for SE/Z Construction, LLC

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HOBSON FABRICATING CORP., an
Idaho corporation,

Plaintiff,

v.

SE/Z CONSTRUCTION, LLC, an Idaho
limited liability company; and STATE OF
IDAHO, acting by and through its
Department of Administration, Division of
Public Works,

Defendants,

STATE OF IDAHO, acting by and
through its Department of Administration,
Division of Public Works,

Counter-Claimant,

v.

HOBSON FABRICATING CORP., an
Idaho corporation,

Counter-Defendant,

Case No. CV-OC-05 8037

AFFIDAVIT OF STEVE
ZAMBARANO

JUL/30/2010/FRI 09:58 AM RACINE OLSON

FAX No. 2085286109

P. 007

SE/Z CONSTRUCTION, LLC, an Idaho
limited liability company,

Cross-Claimant,

v.

STATE OF IDAHO, acting by and
through its Department of Administration,
Division of Public Works,

Cross-Defendant,

STATE OF IDAHO, acting by and
through its Department of Administration,
Division of Public Works,

Counter-Cross-Claimant,

v.

SE/Z CONSTRUCTION, LLC, an Idaho
limited liability company,

Counter-Cross-Defendant,

STATE OF IDAHO, acting by and
through its Department of Administration,
Division of Public Works,

Third-Party Plaintiff,

v.

RUDEEN & ASSOCIATES, A
PROFESSIONAL COMPANY, an Idaho
limited liability company,

Third-Party Defendant.

STATE OF IDAHO)
) ss.
County of Bonneville)

STEVE ZAMBARANO being first duly sworn on oath deposes and states as follows:

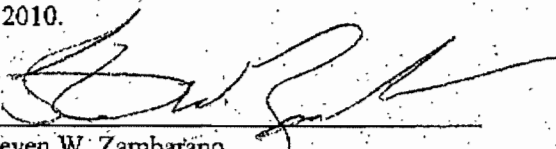
1. I am the managing member of SE/Z Construction, LLC ("SE/Z Construction") and make this Affidavit based upon my own personal knowledge, except as otherwise stated. I have owned SE/Z Construction since its inception in 1996 and submit this Affidavit in Opposition to the State of Idaho's Motion to Disallow Costs and Attorneys Fees.
2. In 2004, SE/Z Construction was a medium sized general contractor performing work throughout the State of Idaho and Intermountain Region. At the time the Bio Safety Level III Laboratory Project ("BSL III Project") was performed and then Terminated for Convenience, SE/Z Construction's annual revenues from construction services was between fifteen (15) and sixteen (16) million dollars. SE/Z Construction was authorized to bond single projects up to \$7.5 million and in a cumulative amount of \$14 million. SE/Z Construction was able to maintain a "AAA" Idaho public works license.
3. As a result of this lawsuit, SE/Z Construction's business was severely and negatively impacted. After the Termination for Convenience of the BSL III

Project, the State of Idaho, Department of Administration, Division of Public Works ("DPW") refused to pay SE/Z Construction its retention or for extra work completed on the BSL III Project. DPW refused to pay SE/Z Construction until the recent settlement of this case, which was over five years from the time the payments were due. In addition, SE/Z Construction was required to pay costs, attorneys fees, and expert fees to prosecute this action and defend against DPW's Cross-Claims. As a result of the lack of cash flow from DPW's refusal to release retention and payment due on the BSL III Project, and the costs required to defend DPW's Cross-Claim, SE/Z Construction's annual construction revenue was cut to approximately 1/3 of the construction revenue as of 2004-2005. SE/Z Construction is now only able to maintain a "AA" public works license due to the decline in its business.

4. Additionally, and more importantly, SE/Z Construction's bonding capacity was reduced by its bonding company to \$1.5 million for a single project and \$3 to 4 million in the aggregate. SE/Z Construction's decline in construction revenue is identified in its annual financial statements, which SE/Z Construction will provide to the court for review *in camera* if requested by the court.

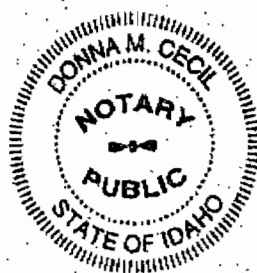
5. As a direct result of the litigation in the matter, SE/Z Construction was required to sell its office building and construction yard in order to maintain cash flow, to defend itself and to remain in business. This litigation has severely impacted both SE/Z Construction and my personal financial position. It is my belief and opinion that the decline in SE/Z Construction's business and bonding capacity is directly attributable to this litigation.

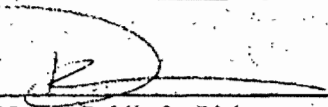
Dated this 29th day of July, 2010.


Steven W. Zambarano
SE/Z Construction, LLC

SUBSCRIBED AND SWORN to before me this 29th day of July, 2010.

(seal)




Notary Public for Idaho

Residing at: 1268 Austin Ave. Id Falls, ID

My commission expires: 11-25-15

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the following described pleading or document on the attorneys listed below by ~~hand~~ delivering, by mailing or by facsimile, with the correct postage thereon, on this 24th day of July, 2010.

DOCUMENT SERVED:

AFFIDAVIT OF STEVE ZAMBARANO

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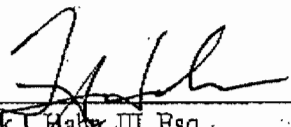
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Frederick J. Nye, III, Esq.
RACINE OLSON NYE BUDGE & BAILEY, CHTD.

N:\PJH\39.37353- SEZ Hobson\Affidavit of Steven W. Zambarano.wpd:bul

LAWRENCE G. WASDEN
ATTORNEY GENERAL
Steven L. Olsen, ISB No. 3586
Chief of Civil Litigation

ORIGINAL

FILED 4/30
A.M. P.M.

AUG 06 2010

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W:\11-194.55\Costs.Reply.Zambarano.Aff.doc

Attorneys for Defendants State of Idaho

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HOBSON FABRICATING CORP., an Idaho
corporation,

Plaintiff,

v.

SE/Z CONSTRUCTION, LLC, an Idaho limited
liability company; and STATE OF IDAHO,
acting by and through its Department of
Administration, Division of Public Works,

Defendants.

STATE OF IDAHO, acting by and through its
Department of Administration, Division of
Public Works,

Counter-Claimant,

v.

HOBSON FABRICATING CORP., an Idaho
corporation,

Counter-Defendant.

Case No. CV OC 0508037

**THE STATE OF IDAHO'S REPLY TO
THE AFFIDAVIT OF STEVE
ZAMBARANO**

01548

SE/Z CONSTRUCTION, LLC, an Idaho limited liability company,

Cross-Claimant,

v.

STATE OF IDAHO, acting by and through its Department of Administration, Division of Public Works,

Cross-Defendant.

STATE OF IDAHO, acting by and through its Department of Administration, Division of Public Works,

Counter-Cross-Claimant,

v.

SE/Z CONSTRUCTION, LLC, an Idaho limited liability company,

Counter-Cross-Defendant.

STATE OF IDAHO, acting by and through its Department of Administration, Division of Public Works

Third-Party Plaintiff,

v.

RUDEEN & ASSOCIATES, A PROFESSIONAL COMPANY, an Idaho limited liability company,

Third-Party Defendant.

COMES NOW Defendant State of Idaho acting by and through the Department of Administration, Division of Public Works (the "State") and submits this Reply to SE/Z Construction, LLC's Affidavit of Steve Zambarano.

I. INTRODUCTION

On May 28, 2010, the Court entered a Briefing Schedule and Order requiring the parties to submit simultaneous motions, memoranda, and supporting materials on the issues of prevailing parties and costs and fees no later than June 25, 2010, and any responses to such motions no later than July 9, 2010. The Affidavit of Steve Zambarano was filed more than one month after the deadline for SE/Z to submit supporting materials relating to its claim for costs and fees and is therefore untimely and should not be considered. However, even if considered, SE/Z is still unable to show that awarding discretionary costs against the State would be in the interests of justice.

II. ARGUMENT

SE/Z offers the Affidavit of Steve Zambarano in an attempt to show its claimed discretionary costs should, in the interest of justice, be assessed against the State. In essence, Mr. Zambarano's Affidavit claims the State improperly withheld funds held in retention and payment for extra work, and forced SE/Z to incur litigation costs in prosecuting its claim for payment and defending against the State's counterclaim for grossly defective work. Mr. Zambarano states that as a result of these actions SE/Z's business was hurt.

Mr. Zambarano's Affidavit wants to shift responsibility for this lawsuit and its protracted nature to the State. However, it was SE/Z and Hobson that set this lawsuit in motion and their outrageous demands that ensured this case could not be quickly resolved. At the time SE/Z was terminated, it had already been paid \$1,362,329, and the schedule of values attached to its Pay Applications indicated the work was 100% completed. The only amount that had not been paid was the withheld retainage (5% of the contract amount--\$71,703) and \$23,452 for work identified on the final pay request (\$495 for Doors and Hardware; \$2,500 for Start-up; \$1,345 for

Change Order No. 16; and \$19,112 for Change Order No. 18 (which was the disputed Change Order regarding the MAU platform)). However, instead of submitting a request for equitable adjustment in the amount of \$95,155 or similar reasonable amount, the State received a demand from SE/Z and Hobson for **\$1,973,107.38**—nearly twenty times the amount owed.

Second, SE/Z did incur costs and fees in defending against the State's cross-claim in this matter. As evidenced by the Photo Journal submitted by the State in opposition to SE/Z and Hobson's request for costs and fees, SE/Z failed to construct the BSL 3 lab pursuant to the plans and specifications or in a workmanlike manner. SE/Z and Hobson's defective work required the State to incur substantial costs, in addition to the amounts already paid to SE/Z to repair and rebuild the poorly constructed laboratory, and resulted in the State filing its legitimate claims and offset defenses against SE/Z and Hobson. SE/Z incurred litigation costs in this matter defending against the State's claims and defenses, based upon its poor work on the BSL Project.

SE/Z and Hobson's outrageous demands for payment after the termination for convenience and their failure to follow the plans and specifications drove the instant lawsuit, and resulted in all parties and the court expending considerable time, effort and resources to this matter.

Lastly, Mr. Zambarano is quick to attribute all of SE/Z's financial woes to the lawsuit. By doing so, he fails to take into account the downturn the economy has faced and the likely impact such downturn had on the construction industry and SE/Z's finances.

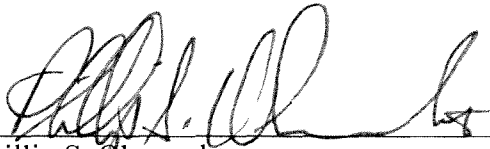
III. CONCLUSION

Mr. Zambarano's affidavit is untimely and should not be considered. However, even if considered, the Affidavit fails to show that the interests of justice would be furthered by

assessing SE/Z's discretionary costs, and the State respectfully requests the Court deny SE/Z's claims for costs and fees.

DATED this 6th day of August, 2010.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By 
Phillip S. Oberrecht
Special Deputy Attorney General
Of the Firm Hall, Farley, Oberrecht
& Blanton, P.A.
Attorneys for Defendant State of Idaho,

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of August, 2010, I caused to be served a true copy of the foregoing **THE STATE OF IDAHO'S REPLY TO THE AFFIDAVIT OF STEVE ZAMBARANO**, by the method indicated below, and addressed to each of the following:

David M. Penney
Cosho Humphrey, LLP
800 Park Blvd., Ste. 790
Boise, ID 83712
Fax No.: (208) 338-3290

- ☐ U.S. Mail, Postage Prepaid
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Frederick J. Hahn, III
RACINE OLSON NYE BUDGE
& BAILEY, Chtd.
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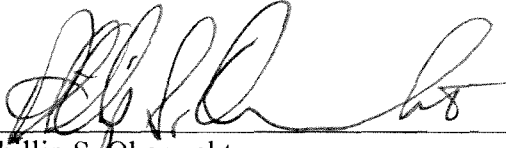
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Phillip S. Oberrecht

SEP 15 2010

J. DAVID NAVARRO, Clerk
By INGA JOHNSON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HOBSON FABRICATING CORP., an
Idaho corporation,

Plaintiff,

vs.

SE/Z CONSTRUCTION, LLC, an
Idaho limited liability company; and
STATE OF IDAHO, acting by and through
its Department of Administration, Division
of Public Works,

Defendants.

Case No. CVOC-0508037

**MEMORANDUM DECISION AND
ORDER ON PREVAILING
PARTY, COSTS AND
ATTORNEY FEES**

SE/Z CONSTRUCTION, LLC, an
Idaho limited liability company,

Cross-claimant,

vs.

STATE OF IDAHO, acting by and through
its Department of Administration, Division
of Public Works,

Cross-defendant.

STATE OF IDAHO, acting by and through
its Department of Administration, Division
of Public Works,

01554

1 Counter-cross-claimant,

2 vs.

3 SE/Z CONSTRUCTION, LLC, an
4 Idaho limited liability company,

5 Counter-cross-defendant.

6
7 STATE OF IDAHO, acting by and through
8 its Department of Administration, Division
of Public Works,

9 Third Party Plaintiff,

10 vs.

11 RUDEEN & ASSOCIATES, A
12 PROFESSIONAL COMPANY, an
13 Idaho limited liability company,

14 Third Party Defendant.

15
16 This matter comes before the Court on two motions.¹ First, Defendants Ken Gardner, David
17 Rook, Chris Motley, Elaine Hill, Larry Osgood, and Jan Frew (the Individual Defendants) Motion
18 for Costs as a Matter of Right against Plaintiff Hobson Fabricating Corp. (Hobson). Hobson
19 opposes the motion. Second, Hobson and Defendant SE/Z Construction, LLC's (the Contractors)
20 Joint Motion for Determination of Prevailing Party Status, and Award of Costs and Attorney Fees as
21

22
23
24 ¹ A cross-claim brought by the State against Third Party Defendant Rudeen & Associates was dismissed by the Court on
25 March 24, 2010. Issues concerning costs and fees between the State and Rudeen were resolved by a settlement.
26

1 between the Contractors and Defendant State of Idaho Department of Administration, Division of
2 Public Works (the State). The State opposes the Joint Motion.

3 The Court heard oral argument on the Motions on August 9, 2010. Appearing before the
4 Court were J. Todd Henry for Plaintiff Hobson, Frederick Hahn for Defendant SE/Z, and Phillip
5 Oberrecht for Defendant the State and the Individual Defendants. The Court took the matters fully
6 under advisement at that time.

7 PREVAILING PARTY STATUS

8 The determination of which party is the prevailing party and to what extent is within the
9 discretion of the trial court. *J.R. Simplot Co. v. W. Heritage Ins. Co.*, 132 Idaho 582, 584, 977 P.2d
10 196, 198 (1999). A party may be considered to be the prevailing party if they receive, "the most
11 favorable outcome that could possibly be achieved." *Daisy Mfg. Co., Inc. v. Paintball Sports, Inc.*,
12 134 Idaho 259, 262, 999 P.2d 914, 917 (Ct. App. 2000).

14 Often neither party receives "the most favorable outcome that could possibly be achieved,"
15 and prevailing party status is determined otherwise. Under Idaho Rule of Civil Procedure
16 54(d)(1)(B), there are three principal factors the trial court must consider when determining which
17 party, if any, prevailed: (1) the final judgment or result obtained in relation to the relief sought; (2)
18 whether there were multiple claims or issues between the parties; and (3) the extent to which each of
19 the parties prevailed on each of the claims or issues. *Chadderdon v. King*, 104 Idaho 406, 411, 659
20 P.2d 160, 165 (Ct. App. 1983). Offers of settlement should be considered when analyzing the final
21 result in relation to relief sought; however, settlements should not be the only element, or even the
22 most important element, of that analysis. *Zenner v. Holcomb*, 147 Idaho 444, 447-8, 210 P.3d 552,
23 556-7 (2009). Where there are multiple claims and counterclaims between opposing parties, the court
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examines and determines the prevailing party question from an overall view, not a claim-by-claim analysis. *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005).

COSTS AND ATTORNEY FEES

I.R.C.P. 54(d)(1)(A) states that a prevailing party shall be awarded costs, unless otherwise provided by the Court or limited by the Rules. I.R.C.P. 54(d)(1)(D) commits the decision of whether to award certain costs to the discretion of the trial court. *Van Brunt v. Stoddard*, 136 Idaho 681, 689, 39 P.3d 621, 629 (2001). I.R.C.P. 54(e)(1) states that the Court may award reasonable attorney fees. "The mere fact that a party is successful in asserting or defeating a single claim does not mandate" an award of costs or fees to the prevailing party on that specific claim. *Chenery v. Agri-Lines Corp.*, 106 Idaho 687, 693, 682 P.2d 640, 646 (Ct. App. 1984). Additionally, when both parties are successful it is in the Court's discretion to decline an award of costs and attorney fees to either side. *Shore v. Peterson*, 146 Idaho 903, 914, 204 P.3d 1114, 1125 (2009); *Ace Realty Inc. v. Anderson*, 106 Idaho 742, 750, 682 P.2d 1289, 1297 (Ct. App. 1984).

INDIVIDUAL DEFENDANTS

The Court finds that in the claims for slander, tortious interference with contractual relations, and intentional interference with prospective economic relations between Hobson and the Individual Defendants, the Individual Defendants were the prevailing parties. While the Individual Defendants were represented by the State, they were not parties to the multiple claims and counter-claims between the State and the Contractors that comprised the overall case. Additionally, the claims against the Individual Defendants were dismissed in Summary Judgment in their favor, the most favorable outcome they could possibly achieve.

1 Because they were clearly the prevailing parties, the Individual Defendants are entitled to
2 I.R.C.P 54(d)(1)(C) Costs as a Matter of Right. The Individual Defendants applied for costs under
3 subsections (1),(9), and (10) of that rule. The Court finds those costs are warranted under the rule
4 and awards the Individual Defendants \$1,012.80.

5 THE STATE AND THE CONTRACTORS

6 In the overall case, the Court finds both parties prevailed in part. The State terminated its
7 contract with SE/Z for convenience. Under the contract, this required the State to pay certain
8 legitimate costs. The essential claim of the contractors was that the State's termination for
9 convenience had the effect of converting the contract from a Fixed Price Contract to a Cost Plus
10 Contract. Such was not the case. In that respect, the State ultimately prevailed.

11 On the other hand, in its counterclaim, the State theorized that the contract allowed the State
12 to pursue off-sets and counterclaims. Prior to the first trial, the Court held that a genuine issue of
13 material fact existed as to whether the Contractors had waived their right to notice of defects and the
14 opportunity to cure. The trial would focus on that narrow issue. Although the factual issue involved
15 was narrow, the quantity of evidence required to prove actual notice and no prejudice to the
16 Contractors was massive. So massive in fact, that once trial was underway, it became apparent that
17 the trial would take several weeks longer than anticipated. Since all parties would not agree to
18 waive their right to a trial by jury, the Court declared a mistrial and rescheduled a second trial well
19 over a year later.

20 In ruling on Motions in Limine for the second trial, the Court narrowed the issues,
21 effectively reducing the claims of the parties. In light of the Court's rulings on those Motions in
22

1 Limine, the parties informed the Court prior to trial that they had settled their substantive claims in
2 all respects but for the prevailing party issue, and the award of costs and attorney fees.

3 Because the State sought to limit the Contractors' claims and was ultimately successful, and
4 because the Contractors sought to narrow the State's counterclaims and offsets and was ultimately
5 successful, the Court now holds that each party prevailed in part.

6 When both parties are considered prevailing, the Court may, in its discretion, decline an
7 award of costs or fees to either side. *Shore v. Peterson*, 146 Idaho 903, 914, 204 P.3d 1114, 1125
8 (2009); *Ace Realty Inc. v. Anderson*, 106 Idaho 742, 750, 682 P.2d 1289, 1297 (Ct. App. 1984); *see*
9 *also Israel v. Leachman*, 139 Idaho 24, 27, 72 P.3d 864, 867 (2003). In the overall case, both parties
10 were required to expend considerable resources both asserting and defending claims. Hobson's
11 initial claim against SE/Z and the State sought more than \$1.5 million; SE/Z's cross-claim against
12 the State sought more than \$1.9 million; and the State's counter-claim sought more than \$2.6
13 million. In the end, the case settled with the State paying SE/Z \$225,000.00 with no admission of
14 liability. Over the course of five years, numerous other claims were addressed through motion
15 hearings. Each party prepared for and conducted three weeks of trial which ended in a mistrial. Each
16 party prevailed on some issues and each party lost on other issues. For all these reasons, the Court
17 orders each party bear its own costs and fees.
18
19

20 CONCLUSION

21 In summary, the Court has determined:

22 1) The Individual Defendants are the prevailing parties in the claims against them. They are
23 awarded \$1,012.80 as I.R.C.P. 54(d)(1)(C) Costs as a Matter of Right.
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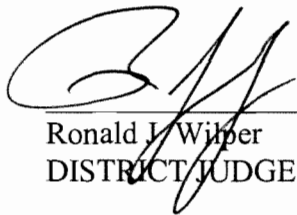
1 2) The State and the Contractors each prevailed in part on their respective claims/counterclaims.

2 Each party is to bear its own costs and fees.

3
4 Counsel for the State is directed to prepare a Judgment consistent with this Order for the
5 Court's signature.

6 IT IS SO ORDERED.

7 Dated this 14th day of September, 2010.

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11 Ronald J. Wilber
12 DISTRICT JUDGE
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CERTIFICATE OF MAILING

I, HEREBY CERTIFY that on the 19 day of September, 2010, I caused a true and correct copy of the foregoing MEMORANDUM DECISION AND ORDER ON PREVAILING PARTY, COSTS, AND ATTORNEY FEES to be served by the method indicated below, and addressed to the following:

J. Todd Henry
701 Pike St., Ste. 1700
Seattle, WA 98101-3930

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
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Phillip S. Oberrecht
702 W. Idaho, Ste 700
P.O. Box 1271
Boise, ID 83701

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Frederick J. Hahn, III
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Robert A. Anderson
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David Penny
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☐ Overnight Mail
☐ Facsimile

J. DAVID NAVARRO
Clerk of the District Court
Ada County, Idaho

By

Deputy Clerk

INGA JOHNSON

ORIGINAL

RECEIVED
JUN 09

Ada County Clerk

Robert A. Anderson, ISB No. 2124
Michael P. Stefanic, ISB No. 4029
ANDERSON, JULIAN & HULL LLP
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Telephone: (208) 344-5800
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E-Mail: raanderson@ajhlaw.com

Attorneys for Third-Party Defendant
Rudeen & Associates

NO. _____ FILED _____
A.M. 10:40 P.M.

SEP 23 2010

J. DAVID NAVARRO, Clerk
By _____ DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HOBSON FABRICATING CORP., an Idaho
corporation,

Plaintiff,

vs.

SE/Z CONSTRUCTION, LLC, an Idaho
limited liability company; and **STATE OF
IDAHO**, acting by and through its
Department of Administration, Division of
Public Works,

Defendants.

SE/Z CONSTRUCTION, LLC, an Idaho
limited liability company,

Cross-Claimant/
Counter-Cross-Defendant,

vs.

STATE OF IDAHO, acting by and through
its Department of Administration, Division of
Public Works,

Case No. CV OC 0508037

JUDGMENT

Cross-Defendant/
Counter-Cross-Claimant.
STATE OF IDAHO, acting by and through
its Department of Administration, Division of
Public Works,

Counterclaimant,
vs.

HOBSON FABRICATING CORP., an Idaho
corporation,

Counterdefendant.

STATE OF IDAHO, acting by and through
its Department of Administration, Division of
Public Works,

Third-Party Plaintiff,
vs.

RUDEEN & ASSOCIATES, a professional
company, an Idaho limited liability company,

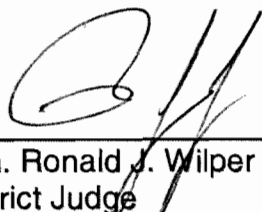
Third-Party Defendant.

The Court having issued its Memorandum Decision and Order on Motion to Reconsider, Motion for Clarification and Motions in Limine on the 2nd day of April, 2010, in favor of Rudeen & Associates ("Rudeen"), the following Judgment is entered:

THE COURT ORDERS, AND THIS DOES ORDER, that all claims against Rudeen & Associates are dismissed with prejudice.

THE COURT ALSO FINDS AND ORDERS THAT Rudeen & Associates is the prevailing party with regard to the Third Party Complaint filed by the State of Idaho. The Court may award costs and fees in an amount to be later determined.

DATED this 11th day of June, 2010.

By 
Hon. Ronald J. Wilper
District Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 23rd day of ~~June~~ ^{Sept}, 2010, I served a true and correct copy of the foregoing **JUDGMENT** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

David M. Penny
COSHO HUMPHREY, LLP
800 Park Blvd., Ste. 790
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dpenny@cosholaw.com

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[]	Overnight Mail
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Attorneys for Plaintiff

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Construction, LLC*

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Overnight Mail
Facsimile

*Attorneys for Defendant State of
Idaho*

J. DAVID NAVAPRO

INGA JOHNSON

Clerk

RECEIVED

SEP 23 2010

Ada County Clerk

NO.

A.M.

10:30 FILED P.M.

SEP 24 2010

J. DAVID NAVARRO, Clerk

By

INGA JOHNSON

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HOBSON FABRICATING CORP., an Idaho
corporation,

Plaintiff,

v.

SE/Z CONSTRUCTION, LLC, an Idaho limited
liability company; and STATE OF IDAHO,
acting by and through its Department of
Administration, Division of Public Works,

Defendants.

STATE OF IDAHO, acting by and through its
Department of Administration, Division of
Public Works,

Counter-Claimant,

v.

HOBSON FABRICATING CORP., an Idaho
corporation,

Counter-Defendant.

SE/Z CONSTRUCTION, LLC, an Idaho limited
liability company,

Cross-Claimant,

v.

STATE OF IDAHO, acting by and through its
Department of Administration, Division of
Public Works,

Cross-Defendant.

STATE OF IDAHO, acting by and through its
Department of Administration, Division of

Case No. CV OC 0508037

JUDGMENT

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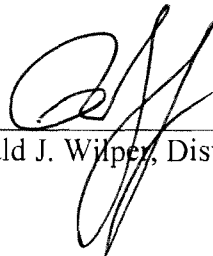
Public Works,)	
)	
Counter-Cross-Claimant,)	
v.)	
)	
SE/Z CONSTRUCTION, LLC, an Idaho limited)	
liability company,)	
)	
Counter-Cross-Defendant.)	
)	
STATE OF IDAHO, acting by and through its)	
Department of Administration, Division of)	
Public Works)	
)	
Third-Party Plaintiff,)	
v.)	
)	
RUDEEN & ASSOCIATES, A)	
PROFESSIONAL COMPANY, an Idaho)	
limited liability company,)	
)	
Third-Party Defendant.)	
)	
HOBSON FABRICATING CORP., an Idaho)	Case No. CV OC 06-00191
corporation,)	
)	
Plaintiff,)	
v.)	
)	
KEN GARDNER, an individual; DAVID)	
ROOK, an individual; JAN FREW, an)	
individual; LARRY OSGOOD, an individual;)	
CHRIS MOTLEY, an individual; and ELAINE)	
HILL, an individual,)	
)	
Defendants,)	
)	

On April 24, 2007, the Court issued its Memorandum Decision and Order granting Ken Gardner, David Rook, Jane Frew, Larry Osgood, Chris Motley and Elaine Hill ("the Individual Defendants") summary judgment as to the claims alleged against them by Hobson Fabricating

Corporation ("Hobson"). On September 15, 2010, the Court issued its Memorandum Decision and Order on Prevailing Party, Costs and Attorney Fees.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that, consistent with the April 24, 2007 Memorandum Decision and Order and the September 15, 2010 Memorandum Decision and Order on Prevailing Party, Costs and Attorney Fees, the Individual Defendants are awarded costs against Hobson in the amount of \$1,012.80.

DATED this 24 day of September, 2010.



Ronald J. Wilper, District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24 day of September, 2010, I caused to be served a true copy of the foregoing, by the method indicated below, and addressed to each of the following:

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800 Park Blvd., Ste. 790
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Fax No.: (208) 338-3290

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& BAILEY, Chtd.
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Fax No. 344-5510

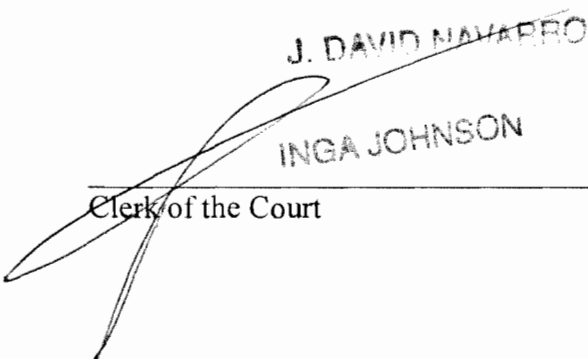
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Clerk of the Court

DAVID M. PENNY, ISB #3631
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BOISE, IDAHO 83707-9518
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Counsel for Hobson Fabricating Corp.

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J. TODD HENRY, WSBA 32219, Pro Hac Vice
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Telephone: (206) 623-3427
Facsimile: (206) 682-6234

Counsel for Hobson Fabricating Corp.

NQ
FILED
A.M. 1:53 PM

OCT 26 2010

J. DAVID NAVARRO, Clerk
By J. RANDALL
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HOBSON FABRICATING CORP., an Idaho
corporation,

Plaintiff,

v.

SE/Z CONSTRUCTION, LLC, an Idaho
limited liability company; and STATE OF
IDAHO, acting by and through its
Department of Administration, Division of
Public Works,

Defendants,

STATE OF IDAHO, acting by and through
its Department of Administration, Division of
Public Works,

Counter-Claimant,

v.

HOBSON FABRICATING CORP. an Idaho
corporation,

Counter-Defendant,

NO. CV-OC-2005-08037

NOTICE OF APPEAL

NOTICE OF APPEAL- 1

01570

SE/Z CONSTRUCTION, LLC, an Idaho
limited liability company,

Cross-Claimant,

v.

STATE OF IDAHO, acting by and through
its Department of Administration, Division of
Public Works,

Cross-Defendant,

STATE OF IDAHO, acting by and through
its Department of Administration, Division of
Public Works,

Counter-Cross-Claimant,

v.

SE/Z CONSTRUCTION, LLC, an Idaho
limited liability company,

Counter-Cross-Defendant,

STATE OF IDAHO, acting by and through
its Department of Administration, Division of
Public Works,

Third Party Plaintiff,

v.

RUDEEN & ASSOCIATES, a professional
company, an Idaho limited liability company,

Third Party Defendant.

**TO: THE ABOVE-NAMED RESPONDENT STATE OF IDAHO, AND ITS
COUNSEL, HALL, FARLEY, OBERRECHT & BLANTON, P.A., AND THE
CLERK OF THE ABOVE-ENTITLED COURT**

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellant Hobson Fabricating Corp. ("Hobson") appeals against the above-named Respondent The State of Idaho acting by and through the Department of Administration, Division of Public Works, to the Idaho Supreme Court, from the Memorandum

Decision and Order on Prevailing Party Costs and Attorneys Fees, entered in the above-entitled action on September 15, 2010, the Honorable Ronald J. Wilper presiding, and the Judgment entered in the above-entitled action on September 27, 2010, the Honorable Ronald J. Wilper presiding.

2. Appellant Hobson has a right to appeal to the Idaho Supreme Court, and the Order and Judgment described in paragraph 1 above are appealable under and pursuant to Rule 11(a)(1) of the I.A.R.

3. The following is a preliminary statement of the issues on appeal, which the Appellant intends to assert in the appeal:

- a. Whether the District Court erred as a matter of law in ruling that both the Defendant State of Idaho and Appellant were partially prevailing parties in the above-referenced action, and therefore ruling that neither was entitled to an award of costs or attorney's fees
- b. Whether the District Court erred as a matter of law in determining that the above-named Individual Defendants were prevailing parties in this action, and therefore entitled to an award of certain costs as a matter of right.
- c. Whether the Trial Court erred as a matter of law in failing or refusing to rule on Appellant's request for an award of costs and attorney's fees under I.C. 12-117.

4. No order has been entered sealing any portion of the record.

5. A Reporter's Transcript of the Hearing on Appellant's Motion for an Award of Costs and Attorneys Fees, held on August 9, 2010, has been requested and an estimated transcript fee has been paid to the Reporter.

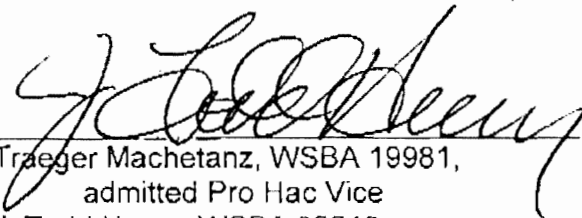
6. The Appellant requests the following documents, relating to the issues on Appellant's appeal be included in the Clerk's record in addition to those automatically included under Rule 28, I.A.R.:
- a. The Court's Memorandum Decision and Order on Hobson's and SE/Z's Motions for Partial Summary Judgment, dated July 24, 2006;
 - b. The Court's Memorandum Decision and Order Granting Plaintiff Hobson's Motion for Partial Summary Judgment and Denying Counter-Defendant SE/Z's Motion for Partial Summary Judgment, dated February 24, 2007;
 - c. The Court's Memorandum Decision and Order dated April 24, 2007;
 - d. The Court's Order Resetting Proceedings and Trial, dated November 12, 2008;
 - e. The Court's Memorandum Decision and Order on Plaintiff's Motions in Limine, dated March 26, 2010;
 - f. The Court's Memorandum Decision and Order on Motion to Reconsider, Motion for Clarification and Motions in Limine, dated April 2, 2010;
 - g. Stipulation of the Parties, dated May 5, 2010;
 - h. The Court's Order dated May 10, 2010;
 - i. The Court's Briefing Schedule and Order, dated May 27, 2010;
 - j. SE/Z Construction's Motion for Award of Costs and Attorney's Fees, dated June 24, 2010;
 - k. Affidavit of Frederick J. Hahn, III in Support of the Joint Motion and Memorandum Regarding Prevailing Party and Award of Costs and Attorney's Fees, dated June 24, 2010;
 - l. Affidavit of Counsel in Support of SE/Z Construction's Motion for Award of Costs and Attorney's Fees, dated June 24, 2010;

- m. Plaintiff Hobson Fabricating Corp.'s and Defendant SE/Z Construction's Joint Motion for Award of Costs and Attorney's Fees, dated June 25, 2010;
 - n. Memorandum in Support of Hobson Fabricating's and Defendant SE/Z Construction's Joint Motion for Award of Costs and Attorney's Fees, dated June 25, 2010;
 - o. Affidavit of J. Todd Henry in Support of the Joint Motion and Memorandum Regarding Determination of Prevailing Party and Award of Costs and Attorney's Fees, dated June 25, 2010;
 - p. The Individual Defendants' Verified Memorandum of Costs against Hobson Fabricating Corp., dated June 25, 2010;
 - q. Plaintiff's Opposition to the Individual Defendants' Verified Memorandum of Costs against Hobson Fabricating Corp., dated July 9, 2010;
 - r. The State of Idaho's Memorandum in Support of Motion to Disallow SE/Z and Hobson's Joint Motion for Award of Costs and Fees, dated July 9, 2010;
 - s. Affidavit of Counsel in Support of the State of Idaho's Memorandum in Support of Motion to Disallow SE/Z and Hobson's Joint Motion for Award of Costs and Fees, dated July 9, 2010
 - t. Affidavit of Steve Zambarano, dated July 29, 2010; and
 - u. The Court's Memorandum Decision and Order on Prevailing Party, Costs and Attorney's Fees, dated September 14, 2010.
7. The Appellant does not request any charts, pictures or exhibits be sent to the Supreme Court at this time.
8. I certify:
- (a) That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

- a. Name and Address: Diane Cromwell, 605 W. Fort Street, Boise, Idaho 83702.
- (b)(1) ☒ That the clerk of the district court has been paid the estimated fee for preparation of the reporter's transcript.
- (2) ☐ That the appellant is exempt from paying the estimated transcript fee because
- (c)(1) ☒ That the estimated fee for preparation of the clerk's record has been paid.
- (2) ☐ That the appellant is exempt from paying the estimated fee for the preparation of the record because
- (d)(1) ☒ That the appellate filing fee has been paid.
- (2) ☐ That the appellant is exempt from paying the appellate filing fee because
- (e) That service has been made upon all parties required to be served pursuant to Rule 20.

Dated this 26th day of October, 2010.

OLES MORRISON RINKER & BAKER, LLP



Traeger Machetanz, WSBA 19981,

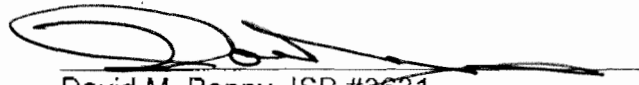
admitted Pro Hac Vice

J. Todd Henry, WSBA 32219,

admitted Pro Hac Vice

Counsel for Appellant Hobson Fabricating Corp.

COSHO HUMPHREY, LLP



David M. Penny, ISB #3631

Counsel for Appellant Hobson Fabricating, Corp.

CERTIFICATE OF SERVICE

I HERBY CERTIFY that on this 26th day of October, 2010 a true and correct copy of the above and foregoing document was served as follows:

Frederick J. Hahn, III
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BAILEY, CHARTERED
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PO Box 50698
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[X] Via Facsimile (208) 528-6109

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[] Via Facsimile (208) 395-8585

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Boise, ID 83707-7426

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[X] Hand Delivery
[] Federal Express or Other
Overnight Courier
[] Via Facsimile (208) 344-5510


David M. Penney

4842-6496-0263, v. 6

HOBSON FABRICATING'S NOTICE OF APPEAL - 7

TOTAL P.008
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OCT 26 2010
J. DAVID NAVARRO, Clerk
By E. HOLMES
CLERK

John A. Bailey (ISB No. 2619)
Frederick J. Hahn, III (ISB No. 4258)
RACINE, OLSON, NYE
BUDGE & BAILEY, CHARTERED
Post Office Box 50698
Idaho Falls, ID 83405
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jab@racinelaw.net
fjh@racinelaw.net

Attorneys for Cross-Claimant / Cross Appellant
SE/Z Construction, LLC

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ORIGINAL

HOBSON FABRICATING CORP., an Idaho
corporation,

Plaintiff / Appellant,

v.

SE/Z CONSTRUCTION, LLC, an Idaho
limited liability company; and STATE OF
IDAHO, acting by and through its
Department of Administration, Division of
Public Works,

Defendants / Respondents

STATE OF IDAHO, acting by and through
its Department of Administration, Division of
Public Works,

Counter-Claimant / Respondent,

v.

HOBSON FABRICATING CORP., an Idaho
corporation,

Counter-Defendant / Appellant,

Case No. CV-OC-0508037

NOTICE OF CROSS-APPEAL

SE/Z CONSTRUCTION, LLC, an Idaho
limited liability company,

Cross-Claimant / Cross-Appellant,

v.

STATE OF IDAHO, acting by and through
its Department of Administration, Division of
Public Works,

Cross-Defendant / Cross-Respondent,

STATE OF IDAHO, acting by and through
its Department of Administration, Division of
Public Works,

Counter-Cross-Claimant / Cross -
Respondent,

v.

SE/Z CONSTRUCTION, LLC, an Idaho
limited liability company,

Counter-Cross-Defendant / Cross -
Appellant,

STATE OF IDAHO, acting by and through
its Department of Administration, Division of
Public Works,

Third-Party Plaintiff,

v.

RUDEEN & ASSOCIATES, A
PROFESSIONAL COMPANY, an Idaho
limited liability company,

Third-Party Defendant.

**TO: THE ABOVE-NAMED RESPONDENT STATE OF IDAHO, AND ITS
COUNSEL, HALL, FARLEY, OBERRECHT & BLANTON, P.A., AND THE
CLERK OF THE ABOVE-ENTITLED COURT**

NOTICE IS HEREBY GIVEN THAT:

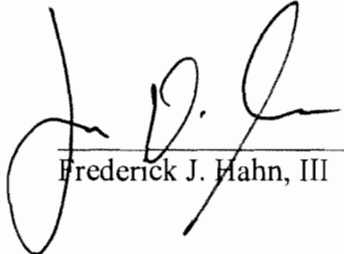
1. The above-named Cross-Appellant SE/Z Construction, LLC ("SE/Z") cross-appeals against the above-named Respondent The State of Idaho, acting by and through the Department of Administration, Division of Public Works (the "DPW"), to the Idaho Supreme Court, from the Memorandum Decision and Order on Prevailing Party Costs and Attorneys Fees, entered in the above-entitled action on September 15, 2010, the Hon. Ronald J. Wilper presiding.
2. Cross-Appellant SE/Z has a right to appeal to the Idaho Supreme Court, and the Order described in paragraph 1 above is appealable under and pursuant to Rule 11(a)(1) of the I.A.R.
3. The following is a preliminary statement of the issues on appeal, which the Cross-Appellant intends to assert in the appeal:
 - a. Whether the District Court erred by as a matter of law in ruling that both the DPW and SE/Z were each partially prevailing parties in the above-referenced action, and therefore ruling that neither was entitled to an award of costs or attorney's fees.
 - b. Whether the Trial Court erred as a matter of law in failing or refusing to grant Cross-Appellant SE/Z an award of costs and attorney's fees pursuant to I.C. 12-117.
4. No additional Reporter's Transcript is requested at this time.
5. No additional documents other than those listed in Appellant's Notice of Appeal are requested in the Clerk's Record at this point in time.
6. The Appellants do not request any charts, pictures or exhibits be sent to the Supreme Court at this time.
7. I certify:
 - (a) That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

Name and Address: Diane Cromwell, 605 W. Fort Street, Boise, Idaho 83702.

- (b) (1) ☒ That the clerk of the district court has been paid the estimated fee for preparation of the reporter's transcript and any additional documents requested in the Cross-appeal.
- (2) ☐ That the appellant is exempt from paying the estimated transcript fee because.
- (c) (1) ☒ That the estimated fee for preparation of the clerk's record has been paid.
- (2) ☐ That the appellant is exempt from paying the estimated fee for the preparation of the record because .
- (d) (1) ☒ That the appellate filing fee has been paid.
- (2) ☐ That the appellant is exempt from paying the appellate filing fee because
- (e) That service has been made upon all parties required to be served pursuant to Rule 20.

Dated this 26th day of October, 2010.

RACINE OLSON NYE BUDGE & BAILEY, Chtd.

 For

Frederick J. Hahn, III

CERTIFICATE OF MAILING

I HERBY CERTIFY that on this 26th day of October, 2010 a true and correct copy of the foregoing Notice of Cross-Appeal was served as follows:

David M. Penny
COSHO HUMPHREY, LLP
PO BOX 9518
Boise, ID 83707-9518
(208) 344-7811
dpenny@cosholaw.com

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J. Todd Henry,
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(206) 623-3427
machetanz@Oles.com
henry@Oles.com

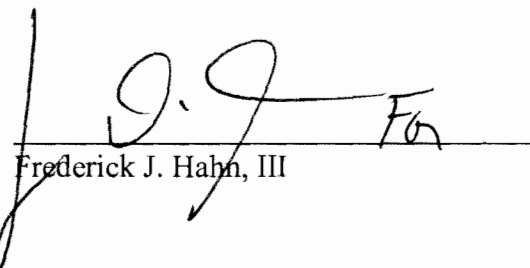
☐ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Federal Express or Other
Overnight Courier
☒ Via Facsimile (206) 682-6234

Phillip S. Oberrecht
HALL FARLEY OBERRECHT
& BLANTON, PA
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(208) 395-8500
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☐ Federal Express or Other
Overnight Courier
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ANDERSON, JULIAN & HULL, LLP
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Boise, ID 83707-7426
(208) 344-5800
raanderson@ajhlaw.com

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☐ Hand Delivery
☐ Federal Express or Other
Overnight Courier
☒ Via Facsimile (208) 344-5510


Frederick J. Hahn, III

LAWRENCE G. WASDEN
ATTORNEY GENERAL
Steven L. Olsen, ISB No. 3586
Chief of Civil Litigation

FILED 431
AM

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J. DAVID NAVARRO, Clerk
By E. HOLMES
DEPUTY

Phillip S. Oberrecht
Special Deputy Attorney General
ISB #1904;psa@hallfarley.com
Chris D. Comstock
ISB #6581;cdc@hallfarley.com
HALL, FARLEY, OBERRECHT & BLANTON, P.A.
702 West Idaho, Suite 700
Post Office Box 1271
Boise, Idaho 83701
Telephone: (208) 395-8500
Facsimile: (208) 395-8585
W:\11-194.55\Appeal\HFOB-Request for Additions to Record.doc
Attorneys for Defendants State of Idaho

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HOBSON FABRICATING CORP., an Idaho corporation,)	
)	Case No. CV OC 0508037
)	
Plaintiff,)	
)	
v.)	DEFENDANT STATE OF IDAHO'S
)	REQUEST FOR ADDITIONS TO THE
)	RECORD
SE/Z CONSTRUCTION, LLC, an Idaho limited liability company; and STATE OF IDAHO, acting by and through its Department of Administration, Division of Public Works,)	
)	
)	
Defendants.)	
)	
STATE OF IDAHO, acting by and through its Department of Administration, Division of Public Works,)	
)	
)	
Counter-Claimant,)	
)	
v.)	
)	
HOBSON FABRICATING CORP., an Idaho corporation,)	
)	
)	
Counter-Defendant.)	

SE/Z CONSTRUCTION, LLC, an Idaho limited liability company,)
)

Cross-Claimant,)

v.)
)

STATE OF IDAHO, acting by and through its Department of Administration, Division of Public Works,)
)

Cross-Defendant.)
)

STATE OF IDAHO, acting by and through its Department of Administration, Division of Public Works,)
)

Counter-Cross-Claimant,)

v.)
)

SE/Z CONSTRUCTION, LLC, an Idaho limited liability company,)
)

Counter-Cross-Defendant.)
)

STATE OF IDAHO, acting by and through its Department of Administration, Division of Public Works)
)

Third-Party Plaintiff,)

v.)
)

RUDEEN & ASSOCIATES, A PROFESSIONAL COMPANY, an Idaho limited liability company,)
)

Third-Party Defendant.)
)

TO: THE ABOVE NAMED PLAINTIFFS/APPELLANTS AND THE PARTIES' ATTORNEYS OF RECORD, AND TO THE CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN, that the defendants/respondents, State of Idaho, in the above entitled proceeding hereby requests, pursuant to Rule 19 of the Idaho Appellate Rules, the inclusion of the following material to the Clerk's Record in addition to that required to be included by the Idaho Appellate Rules and the Notices of Appeal:

1. Requested additions to the Clerk's Record:

10/31/07	Memorandum Decision and Order on Motion for Partial Summary Judgment
3/17/10	State of Idaho's Memorandum in Opposition to Hobson Fabricating Corp.'s Motions in Limine
3/17/10	Affidavit of Counsel in Support of Memorandum in Opposition to Plaintiff Hobson Fabricating Corp.'s Motions in Limine
3/17/10	State of Idaho's Opposition to Motion to Dismiss Rudeen & Associates as Third Party Defendant
3/17/10	Affidavit of Counsel in Support of Memorandum in Opposition to Plaintiff Hobson Fabricating Corp.'s Motion to Dismiss Rudeen & Associates as Third-Party Defendant
3/29/10	State of Idaho's Motion for Clarification
3/29/10	State of Idaho's Memorandum in Support of Motion for Clarification
3/29/10	State of Idaho's Motion to Reconsider
3/29/10	State of Idaho's Memorandum in Support of Motion to Reconsider
3/29/10	Affidavit of Counsel in Support of the State of Idaho's Motion to Reconsider
3/29/10	State of Idaho's Motions in Limine
3/29/10	State of Idaho's Memorandum in Support of Motions in Limine
3/29/10	State of Idaho's Motion to Vacate Trial Setting
4/21/10	Amended Scheduling Order
7/9/10	State of Idaho's Motion to Disallow Joint Motion to Disallow Se/Z Construction, LLC's and Hobson Fabricating Corp.'s Joint Motion for Award of Costs and Fees
8/6/10	State of Idaho's Reply to the Affidavit of Steve Zambarano
9/24/10	Judgment

I certify that this request for additional record has been served upon the clerk of the district court and upon all parties required to be served pursuant to Rule 20.

DATED this 9th day of November, 2010.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By 

for

Phillip S. Oberrecht
Special Deputy Attorney General
Of the Firm Hall, Farley, Oberrecht
& Blanton, P.A.
Attorneys for Defendant State of Idaho,

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of November, 2010, I caused to be served a true copy of the foregoing, by the method indicated below, and addressed to each of the following:

David M. Penney
Cosho Humphrey, LLP
800 Park Blvd., Ste. 790
Boise, ID 83712
Fax No.: (208) 338-3290

- ☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Telecopy

Frederick J. Hahn, III
RACINE OLSON NYE BUDGE
& BAILEY, Chtd.
477 Shoup Ave. Suite 107
P. O. Box 50698
Idaho Falls, Idaho 83405
Fax: 208/528-6109

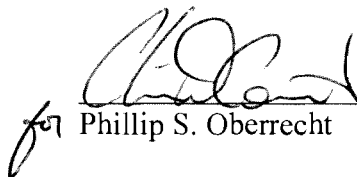
- ☐ U.S. Mail, Postage Prepaid
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☒ Telecopy

Robert A. Anderson
Anderson, Julian & Hull, LLP
250 S. 5th Street, Suite 700
P. O. Box 7426
Boise, ID 83707-7426
Fax No. 344-5510

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☒ Telecopy

Traeger Machetanz
J. Todd Henry
Oles Morrison Rinker & Baker, LLP
701 Pike Street, Ste. 1700
Seattle, WA 98101-3930
Fax No.: (206) 682-6234

- ☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Telecopy


for Phillip S. Oberrecht

NO. _____
AM. 8:00 PM. _____
DEC 20 2010
J. DAVID NAVARRO, Clerk
By BRADLEY J. THIES
DEPUTY

Stephen W. Kenyon
Clerk of Supreme Court
451 W State Street
Boise, Idaho 83720

In re: Hobson Fabricating v. SE/Z Construction, Docket No.
CVOC050837

Notice is hereby given that on Friday, December 3, 2010, I lodged a transcript of 48 pages in length for the above-referenced appeal with the district court clerk of Ada County in the Fourth Judicial District.

The following files were lodged:

Proceeding 8/09/2010

David Cromwell
Tucker & Associates

cc: kloertscher@idcourts.net
PDF format of completed files emailed to Supreme Court

01587

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HOBSON FABRICATING CORP., an Idaho
corporation,

Plaintiff-Appellant,

vs.

STATE OF IDAHO, acting by and through its
DEPARTMENT OF ADMINISTRATION,
Division of Public Works,

Defendant-Counterclaimant-Respondent,
and

SE/Z CONSTRUCTION, LLC, an Idaho limited
liability company,

Defendant-Counterdefendant.

SE/Z CONSTRUCTION, LLC, an Idaho limited
liability company,

Crossclaimant,

vs.

STATE OF IDAHO, acting by and through its
DEPARTMENT OF ADMINISTRATION,
Division of Public Works,

Crossdefendant.

STATE OF IDAHO, acting by and through its
DEPARTMENT OF ADMINISTRATION,
Division of Public Works,

Counter Crossclaimant,

vs.

SE/Z CONSTRUCTION, LLC, an Idaho limited
liability company,

Counter Crossdefendant.

Supreme Court Case No. 38202

CERTIFICATE OF EXHIBITS

CERTIFICATE OF EXHIBITS

01588

STATE OF IDAHO, acting by and through its
DEPARTMENT OF ADMINISTRATION,
Division of Public Works,

Third Party Plaintiff,

vs.

RUDEEN & ASSOCIATES, a professional
company, an Idaho limited liability company,

Third Party Defendant.

HOBSON FABRICATING CORP., an Idaho
corporation,

Plaintiff,

vs.

SE/Z CONSTRUCTION, LLC, an Idaho limited
liability company,

Defendant-Crossclaimant-Counter
Crossdefendant-Appellant,

and

STATE OF IDAHO, acting by and through its
DEPARTMENT OF ADMINISTRATION,
Division of Public Works,

Defendant-Crossdefendant-Counter
Crossclaimant-Respondent.

STATE OF IDAHO, acting by and through its
DEPARTMENT OF ADMINISTRATION,
Division of Public Works,

Counterclaimant,

vs.

HOBSON FABRICATING CORP., an Idaho
corporation,

Counterdefendant.

SUPREME COURT NO. 38216

CERTIFICATE OF EXHIBITS

01589

STATE OF IDAHO, acting by and through its
DEPARTMENT OF ADMINISTRATION,
Division of Public Works,

Third Party Plaintiff,

vs.

RUDEEN & ASSOCIATES, a professional
company, an Idaho limited liability company,

Third Party Defendant.

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of
the State of Idaho in and for the County of Ada, do hereby certify:

There were no exhibits offered for identification or admitted into evidence during the
course of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said
Court this 10th day of January, 2011.

CHRISTOPHER D. RICH
Clerk of the District Court

By BRADLEY J. THIES
Deputy Clerk

SEAL

CERTIFICATE OF EXHIBITS

01590

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HOBSON FABRICATING CORP., an Idaho
corporation,

Plaintiff-Appellant,

vs.

STATE OF IDAHO, acting by and through its
DEPARTMENT OF ADMINISTRATION,
Division of Public Works,

Defendant-Counterclaimant-Respondent,
and

SE/Z CONSTRUCTION, LLC, an Idaho limited
liability company,

Defendant-Counterdefendant.

SE/Z CONSTRUCTION, LLC, an Idaho limited
liability company,

Crossclaimant,

vs.

STATE OF IDAHO, acting by and through its
DEPARTMENT OF ADMINISTRATION,
Division of Public Works,

Crossdefendant.

STATE OF IDAHO, acting by and through its
DEPARTMENT OF ADMINISTRATION,
Division of Public Works,

Counter Crossclaimant,

vs.

SE/Z CONSTRUCTION, LLC, an Idaho limited
liability company,

Counter Crossdefendant.

Supreme Court Case No. 38202

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

01591

STATE OF IDAHO, acting by and through its
DEPARTMENT OF ADMINISTRATION,
Division of Public Works,

Third Party Plaintiff,

vs.

RUDEEN & ASSOCIATES, a professional
company, an Idaho limited liability company,

Third Party Defendant.

HOBSON FABRICATING CORP., an Idaho
corporation,

Plaintiff,

vs.

SE/Z CONSTRUCTION, LLC, an Idaho limited
liability company,

Defendant-Crossclaimant-Counter
Crossdefendant-Appellant,

and

STATE OF IDAHO, acting by and through its
DEPARTMENT OF ADMINISTRATION,
Division of Public Works,

Defendant-Crossdefendant-Counter
Crossclaimant-Respondent.

STATE OF IDAHO, acting by and through its
DEPARTMENT OF ADMINISTRATION,
Division of Public Works,

Counterclaimant,

vs.

HOBSON FABRICATING CORP., an Idaho
corporation,

Counterdefendant.

SUPREME COURT NO. 38216

CERTIFICATE OF SERVICE

01592

STATE OF IDAHO, acting by and through its
DEPARTMENT OF ADMINISTRATION,
Division of Public Works,

Third Party Plaintiff,

vs.

RUDEEN & ASSOCIATES, a professional
company, an Idaho limited liability company,

Third Party Defendant.

I, CHRISTOPHER D. RICH, the undersigned authority, do hereby certify that I have
personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of
the following:

CLERK'S RECORD AND REPORTER'S TRANSCRIPT

to each of the Attorneys of Record in this cause as follows:

DAVID M. PENNY

ATTORNEY FOR APPELLANT

BOISE, IDAHO

PHILLIP S. OBERRECHT

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

CHRISTOPHER D. RICH
Clerk of the District Court

Date of Service: MAR 30 2011

By BRADLEY J. THIES
Deputy Clerk

SEAL

CERTIFICATE OF SERVICE

01593

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HOBSON FABRICATING CORP., an Idaho
corporation,

Plaintiff-Appellant,

vs.

STATE OF IDAHO, acting by and through its
DEPARTMENT OF ADMINISTRATION,
Division of Public Works,

Defendant-Counterclaimant-Respondent,
and

SE/Z CONSTRUCTION, LLC, an Idaho limited
liability company,

Defendant-Counterdefendant.

SE/Z CONSTRUCTION, LLC, an Idaho limited
liability company,

Crossclaimant,

vs.

STATE OF IDAHO, acting by and through its
DEPARTMENT OF ADMINISTRATION,
Division of Public Works,

Crossdefendant.

STATE OF IDAHO, acting by and through its
DEPARTMENT OF ADMINISTRATION,
Division of Public Works,

Counter Crossclaimant,

vs.

SE/Z CONSTRUCTION, LLC, an Idaho limited
liability company,

Counter Crossdefendant.

Supreme Court Case No. 38202

CERTIFICATE TO RECORD

CERTIFICATE TO RECORD

01594

STATE OF IDAHO, acting by and through its
DEPARTMENT OF ADMINISTRATION,
Division of Public Works,

Third Party Plaintiff,

vs.

RUDEEN & ASSOCIATES, a professional
company, an Idaho limited liability company,

Third Party Defendant.

HOBSON FABRICATING CORP., an Idaho
corporation,

Plaintiff,

vs.

SE/Z CONSTRUCTION, LLC, an Idaho limited
liability company,

Defendant-Crossclaimant-Counter
Crossdefendant-Appellant,

and

STATE OF IDAHO, acting by and through its
DEPARTMENT OF ADMINISTRATION,
Division of Public Works,

Defendant-Crossdefendant-Counter
Crossclaimant-Respondent.

STATE OF IDAHO, acting by and through its
DEPARTMENT OF ADMINISTRATION,
Division of Public Works,

Counterclaimant,

vs.

HOBSON FABRICATING CORP., an Idaho
corporation,

Counterdefendant.

SUPREME COURT NO. 38216

CERTIFICATE TO RECORD

01595

STATE OF IDAHO, acting by and through its
DEPARTMENT OF ADMINISTRATION,
Division of Public Works,

Third Party Plaintiff,

vs.

RUDEEN & ASSOCIATES, a professional
company, an Idaho limited liability company,

Third Party Defendant.

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled and bound under my direction as, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsels.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 26th day of October, 2010.

CHRISTOPHER D. RICH
Clerk of the District Court

By BRADLEY J. THIES
Deputy Clerk

CERTIFICATE TO RECORD

01596

RECEIVED

JAN 10 2011

John A. Bailey (ISB No.
Frederick J. Hahn, III (ISB No. 4258)
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fjh@racinelaw.net

Attorneys for SE/Z Construction, LLC

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HOBSON FABRICATING CORP., an
Idaho corporation,

Plaintiff / Appellant,

v.

SE/Z CONSTRUCTION, LLC, an Idaho
limited liability company; and STATE OF
IDAHO, acting by and through its
Department of Administration, Division
of Public Works,

Defendants,

STATE OF IDAHO, acting by and
through its Department of Administration,
Division of Public Works,

Counter-Claimant / Respondent,

v.

HOBSON FABRICATING CORP., an
Idaho corporation,

Counter-Defendant / Appellant,

NO.

A.M.

FILED
P.M.

4:00

JAN 10 2011

CHRISTOPHER D. RICH, Clerk
By BRADLEY J. THIES
DEPUTY

Case No. CV-OC-0508037

Supreme Court Docket No. 38216

**REQUEST FOR ADDITIONAL
RECORD AND TRANSCRIPT**

SE/Z CONSTRUCTION, LLC, an Idaho
limited liability company,

Cross-Claimant / Appellant,
v.

STATE OF IDAHO, acting by and
through its Department of Administration,
Division of Public Works,

Cross-Defendant / Respondent,

STATE OF IDAHO, acting by and
through its Department of Administration,
Division of Public Works,

Counter-Cross-Claimant /
Respondent,
v.

SE/Z CONSTRUCTION, LLC, an Idaho
limited liability company,

Counter-Cross-Defendant /
Appella,

STATE OF IDAHO, acting by and
through its Department of Administration,
Division of Public Works,

Third-Party Plaintiff,
v.

RUDEEN & ASSOCIATES, A
PROFESSIONAL COMPANY, an Idaho
limited liability company,

Third-Party Defendant.

Defendant/Cross Appellant SE/Z Construction, LLC ("SE/Z) by and through its
counsel of record Racine Olson Nye Budge and Bailey, Chartered, hereby requests
additional documents to added to the Record as follows:
REQUEST FOR ADDITIONAL RECORD - 2

01598

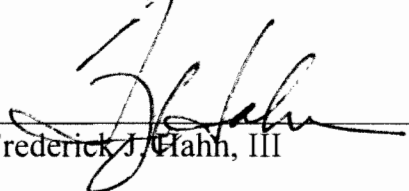
- SE/Z's Motion in Limine filed on or about September 15, 2008;
- The Affidavit of Steve Zambrano in Support of SE/Z's Motion in Limine filed on or about September 15, 2008;
- SE/Z's Memorandum in Support of its Motion in Limine filed on or about September 15, 2008;
- SE/Z's Reply in Support of its Motion in Limine filed on or about September 26, 2008;
- SE/Z's Motion for Reconsideration filed on or about October 7, 2008;
- The Affidavit of Frederick J. Hahn, III in Support of SE/Z's Motion for Reconsideration filed on or about October 7, 2008; and
- The Memorandum in Support of SE/Z's Motion for Reconsideration filed on or about October 7, 2008.

In addition to the foregoing additions to the Record in this matter, SE/Z requests additional Transcript including the following:

- Transcript of the hearing on SE/Z's Motion in Limine, which was held on September 29, 2008;
- Transcript of the hearing on the Motion for Reconsideration held on or about October 15, 2008; and
- The trial transcript of the cross-examination of Steve Zambarano on or about October 30, 2008 or October 31, 2008.

Dated this 6th day of January, 2011.

RACINE OLSON NYE BUDGE
& BAILEY, Chtd.


Frederick J. Hahn, III

CERTIFICATE OF MAILING

I HERBY CERTIFY that on this 6th day of January, 2011 a true and correct copy of the above and foregoing document was served as follows:

David M. Penny
COSHO HUMPHREY, LLP
PO BOX 9518
Boise, ID 83707-9518

☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Federal Express or Other
Overnight Courier
☒ Via Facsimile (208) 338-3290

Traeger Machetanz,
J. Todd Henry,
OLES MORRISON RINKER & BAKER LLP
701 Pike Street, Suite 1700
Seattle, Washington 98101-3930

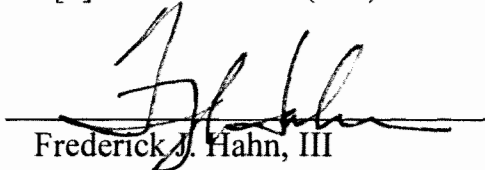
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MAR 30 2011

CHRISTOPHER D. RICH, Clerk
By BRADLEY J. THIES
DEPUTY

Stephen W. Kenyon
Clerk of Supreme Court
451 W State Street
Boise, Idaho 83720

In re: Hobson Fabricating Corp v. Department of Administration,
Docket No. 38202-2010

Notice is hereby given that on Thursday, March 24, 2011, I lodged a transcript of 441 pages in length for the above-referenced appeal with the district court clerk of Ada County in the Fourth Judicial District.

The following files were lodged:

Covers, Proceeding 09/29/2008, Proceeding 10/15/2008, Proceeding 10/29/2008 and Proceeding 10/30/2008

David Cromwell
Tucker & Associates

cc: kloertscher@idcourts.net
PDF format of completed files emailed to Supreme Court

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